(1) Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

INDUSTRIVARDEN SERVICE AB,

Petitioner,

v.

CAROL CLUNE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Under the Due Process Clause and this Court's decision in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), a state may not assert personal jurisdiction over a nonresident defendant unless the defendant has "minimum contacts" with the forum state. "General" personal jurisdiction exists where the defendant's contacts with the forum are so "continuous and systematic" that the defendant can truly be said to be present there; "specific" personal jurisdiction exists where the contacts are more limited, but plaintiff's cause of action "arises out of or relates to" the defendant's contacts with the forum. This Court has already deemed the question concerning the proper scope of "arising out of or related to" under the Due Process Clause, and the existing split in the circuits in defining that phrase, to be sufficiently important to grant certiorari in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991), but ultimately ruled on other grounds.

The question presented is:

1. In a Missouri products liability action where a Swedish manufacturer sold the subject product F.O.B. Sweden to an independent U.S. distributor whose territory did not include Missouri and where the manufacturer's contacts with Missouri were not found to be "continuous and systematic," does plaintiffs' cause of action "arise out of or relate to" the Swedish manufacturer's contacts with Missouri so as to confer "specific" jurisdiction over it consistent with the Due Process Clause?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

In the Eighth Circuit proceeding below, plaintiffs-appellants Carol Clune, Paul L. Clune and Kelly M. Clune, the spouse and children of decedent Joseph Clune, challenged the district court's dismissal of their case for lack of personal jurisdiction.

The caption of the Eighth Circuit's opinion lists three defendants in the case: Alimak AB, Alimak Elevator Company and Industrivarden Service AB. However, as the Eighth Circuit recognized, one of the purported defendants, Alimak AB, was never served with process and hence is not involved in this case. Another defendant, Alimak Elevator Company, was granted summary judgment by the district court on November 13, 1998, and therefore is no longer a party to this action. (*See* App. D, at 41a). This leaves Petitioner Industrivarden Service AB as the only defendant in this case.

The parent company for Petitioner Industrivarden Service AB is AB Industrivarden. There are no publicly held companies owning ten percent (10%) or more of Industrivarden Service AB's stock.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Parties to the Proceeding and Corporate Disclosure Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	iv
Table of Appendices	ix
Opinions Below	1
Basis for Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	7
I. Petitioner Lacks The Minimum Contacts With The State Of Missouri Necessary To Confer Personal Jurisdiction Over It In That Forum Because (1) Plaintiffs' Cause Of Action Did Not "Arise Out Of Or Relate To" Petitioner's Contacts With Missouri And (2) Petitioner's Contacts With Missouri Were Not "Continuous And Systematic" During The Relevant Time Frame.	9
Conclusion	23

TABLE OF CITED AUTHORITIES

Page

Cases:

Access Telecom, Inc. v. MCI Telecommunications Corp., 197 F.3d 694 (5th Cir. 1999) 20

Alpine View Company Ltd v. Atlas Copco AB, 205 F.3d 208 (5th Cir. 2000) 11

Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 107 S. Ct. 1026 94 L. Ed. 2d 92 (1987) ... 14

Barone v. Rich Brothers Interstate Display Fireworks Company, 25 F.3d 610 (8th Cir.), *cert. denied*, 513 U.S. 948, 115 S. Ct. 359, 130 L. Ed. 2d 313 (1994) 10, 11

Bearry v. Beech Aircraft Corp., 818 F.2d 370 (5th Cir. 1987) 21

Braman v. Mary Hitchcock Memorial Hosp., 631 F.2d 6 (2d Cir. 1980) 21

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) 9, 11, 14

Cannon Manufacturing Company v. Cudahy Packing Company, 267 U.S. 333, 45 S. Ct. 250, 69 L. Ed. 634 (1925) 20

Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991) ... i, 13, 14

Cited Authorities

Page

Deluxe Ice Cream Co. v. R.C.H. Tool Corp., 726 F.2d 1209 (7th Cir. 1984) 15

Gates Learjet Corp. v. Jensen, 743 F.2d 1325 (9th Cir.), *cert. denied*, 471 U.S. 1066, 105 S. Ct. 2143, 85 L. Ed. 2d 500 (1985) 21

Gelfand v. Tanner Motor Tours, 339 F.2d 317 (2d Cir. 1964) 16

Haas v. A.M. King Industries, Inc., 28 F. Supp.2d 644 (D. Utah 1998) 20

Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984) 9, 10, 13, 14, 18, 21

International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945) ..... i, 9, 16, 17

Marino v. Hyatt Corp., 793 F.2d 427 (1st Cir. 1986) 16

McMullen v. European Adoption Consultants, Inc., 109 F. Supp.2d 417 (W.D. Pa. 2000) 19

Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560 (2d Cir.) (Cabranes, J.), *cert. denied*, 519 U.S. 1006, 117 S. Ct. 508, 136 L. Ed. 2d 398 (1996) 19, 20, 21

Cited Authorities

Page

Noonan v. Winston Co., 135 F.3d 85 (1st Cir. 1998) 21

Nowak v. Tak How Investments, Ltd., 94 F.3d 708 (1st Cir.), *cert. denied*, 520 U.S. 1155, 117 S. Ct. 1333, 137 L. Ed. 2d 493 (1997) 16

Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 72 S. Ct. 413, 96 L. Ed. 485 (1952) 10

Pizarro v. Hoteles Concorde International, 907 F.2d 1256 (1st Cir. 1990) 16

Prejean v. Sonatrach, Inc., 652 F.2d 1260 (5th Cir. 1981) 15

Rush v. Savchuk, 444 U.S. 320, 100 S. Ct. 571, 62 L. Ed. 2d 516 (1980) 17, 18

Shute v. Carnival Cruise Lines, Inc., 897 F.2d 377 (9th Cir.), *rev'd on other grounds*, 499 U.S. 585, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991) 15

Terzano v. PFC, 986 F. Supp. 706 (D.P.R. 1997) .. 18

Cited Authorities

Page

United Elec., Radio & Machine Workers of America v. 163 Pleasant St. Corp., 960 F.2d 1080 (1st Cir. 1992) 12

Wilson v. Belin, 20 F.3d 644 (5th Cir.), *cert. denied*, 513 U.S. 930, 115 S. Ct. 322, 130 L. Ed. 2d 282 (1994) 21

United States Constitution:

Fourteenth Amendment 2, 5, 6, 22

Statutes:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1332 4

28 U.S.C. § 2101(c) 1

R.S. Mo. Section 506.500 2

Rule:

United States Supreme Court Rule 10(c) 8

Cited Authorities

Page

Other Authorities:

Lea Brilmayer, *et al.*, *A General Look at General Jurisdiction*, 66 Tex. L. Rev. 721 (1988) 8, 14

Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 Sup. Ct. Rev. 77 16

Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 Harv. L. Rev. 1444 (1988) 17

Mark M. Maloney, Note, *Specific Personal Jurisdiction and the "Arise From or Relate To" Requirement . . . What Does It Mean?*, Wash. & Lee L. Rev. 1265 (1993) 15

Mary Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610 (1988) 14, 15

Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121 (1966) 10

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Eighth Circuit Dated And Filed December 1, 2000 ..... 1a

Appendix B — Order Of The United States District Court For The Western District Of Missouri, Western Division Dated And Filed December 3, 1999 ..... 20a

Appendix C — Order Of The United States District Court For The Western District Of Missouri, Western Division Dated And Filed October 27, 1999 ..... 24a

Appendix D — Order Of The United States District Court For The Western District Of Missouri, Western Division Dated And Filed November 13, 1998 ..... 41a

Appendix E — Order Of The United States Court Of Appeals For The Eighth Circuit Denying Petition For Rehearing Dated January 22, 2001 ..... 42a

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit in *Carol Clune, et al. v. Alimak AB, et al.*, 233 F.3d 538 (8th Cir. 2000), is set forth in Appendix A. (*See* App. A, at 1a-19a). The January 22, 2001 order of the United States Court of Appeals for the Eighth Circuit denying Appellee Industrivarden Service AB's Petition for Rehearing En Banc is set forth in Appendix E. (*See* App. E, at 42a) (two judges voted to grant the petition).

The Order of the United States District Court for the Western District of Missouri in *Carol Clune, et al. v. Industrivarden Service AB*, dated October 27, 1999 is unreported and set forth in Appendix C. (*See* App. C, at 24a-40a). The district court's order denying plaintiffs' motion for reconsideration of the district court's October 27, 1999 order is unreported and set forth in Appendix B. (*See* App. B, at 20a-23a). Finally, the district court's November 13, 1998 order granting summary judgment in favor of Alimak Elevator Company is unreported and set forth in Appendix D. (*See* App. D, at 41a).

BASIS FOR JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit reversing the decision of the United States District Court for the Western District of Missouri was entered December 1, 2000. (App. A, at 1a-19a). The Eighth Circuit's order denying Industrivarden Service AB's Motion for Rehearing En Banc was entered on January 22, 2001. (App. E, at 42a). This petition for writ of certiorari is filed within ninety (90) days from that date. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Missouri long-arm statute, R.S. Mo. Section 506.500, provides, in pertinent part:

> 1. Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated in this section, thereby submits such person, firm, or corporation, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of such acts:

(1) The transaction of any business within this state;

(2) The making of any contract within this state;

(3) The commission of a tortious act within this state;

(4) The ownership, use, or possession of any real estate situated in this state;

(5) The contracting to insure any person, property or risk located within this state at the time of contracting.

* * *

3. Only causes of action arising from acts enumerated in this section may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

STATEMENT OF THE CASE

This product liability case arises from the death of Joseph Clune ("decedent") as a result of his fall from a construction hoist in Missouri in February 1996. The decedent's wife and children ("plaintiffs") filed suit in Missouri state court, alleging that a defect in the construction hoist caused decedent's death.[1] The case was removed to the United States

1. The original lawsuit was filed against Alimak Elevator Company and Alimak AB. Alimak Elevator Company moved for summary judgment asserting that it did not exist at the time (Cont'd)

District Court for the Western District of Missouri pursuant to 28 U.S.C. § 1332 based on diversity of citizenship. Petitioner,[2] the Swedish corporation that manufactured the construction hoist, filed a motion to dismiss for lack of personal jurisdiction. The district court granted the motion. The Eighth Circuit reversed the judgment of dismissal. Relief is now sought from this Court in the form of a writ of certiorari.

In 1972, Petitioner sold the construction hoist from which decedent fell F.O.B. Swedish port to Esco Corporation ("Esco"), an independent distributor that subsequently imported the hoist to the United States via Seattle, Washington.[3] In addition to its sale of other products, Esco sold Petitioner's hoists in thirteen western states (not including Missouri). At that time, Petitioner also sold construction hoists to one other independent distributor, B.M. Heede ("Heede"). Heede imported the hoists to the

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(Cont'd)
of manufacture and sale of the construction hoist and had no connection with it. The district court granted summary judgment on November 13, 1998 (App. D, at 41a). About the same time, Industrivarden Service AB was added as a party. Alimak AB was never served with process.

2. The term "Petitioner" as used herein refers to the hoist manufacturer, Linden-Alimak AB, its successor corporation, Alimak AB, and its present corporate entity, Industrivarden Service AB. For purposes of this suit, Industrivarden Service AB exists to assume the liabilities of Linden-Alimak AB and its successor, Alimak AB.

3. No party is able to show who or what entities owned and operated the hoist between its importation by Esco in 1972 and decedent's accident in Missouri in 1996.

United States and sold them in the rest of the country not covered by Esco, including Missouri.[4]

In its motion to dismiss for lack of personal jurisdiction in the district court, Petitioner argued, *inter alia*, that its contacts with the State of Missouri were insufficient to subject it to the jurisdiction of Missouri courts under the Due Process Clause of the Fourteenth Amendment. In particular, Petitioner contended that its 1972 sale of the subject hoist F.O.B. Swedish port to Esco fell short of the minimum contacts required by due process because the subject hoist was transported to Missouri through unknown channels and by the unilateral activity of third persons beyond Petitioner's control.

The district court held that Petitioner did not have sufficient minimum contacts with Missouri during the relevant time period to satisfy constitutional personal jurisdiction standards. In so holding, the district court found that Petitioner did not purposefully avail itself of the privilege of conducting business in Missouri and it refused to find jurisdiction over Petitioner based on the activities of its wholly-owned subsidiary. (App. C, at 37a-38a). Because it did not find sufficient minimum contacts, the district court

4. In 1978, Heede changed its name and became a wholly-owned subsidiary corporation of Petitioner. In 1988, Petitioner sold its construction hoist business to a separate entity not involved in this case, and the assets of Petitioner's wholly-owned subsidiary were also sold to a separate entity not involved in this case. The purchaser of Petitioner's assets adopted the name "Alimak AB." Thus, any reference in the record to activities of Alimak AB after 1988 refers to a separate company and not to Petitioner. From 1988 to the present, Petitioner has been a shell corporation that has no employees and does not manufacture or sell equipment.

did not consider the next prong of the due process analysis, *to wit*, whether the exercise of personal jurisdiction over Petitioner would comport with fair play and substantial justice under the Due Process Clause. (App. C, at 39a).

On appeal to the United States Court of Appeals for the Eighth Circuit, plaintiffs used the stream of commerce theory to argue that the exercise of personal jurisdiction over Petitioner comported with the Due Process Clause of the Fourteenth Amendment. In the majority opinion of the three-judge panel, the court of appeals adopted the stream of commerce theory in reversing the district court's judgment of dismissal.

In holding that Petitioner purposefully availed itself of the privilege of doing business in Missouri, the court of appeals found that "a foreign manufacturer that successfully employs one or two distributors to cover the United States intends to reap the benefit of sales in every state where those distributors market." *Clune v. Alimak AB*, 233 F.3d 538, 544 (8th Cir. 2000). (App. A, at 12a). The Eighth Circuit also noted in its majority opinion that "[o]f the 700 construction hoists that were sold in the United States by the company's distributors, between twenty and forty ended up in Missouri." *Id.*, at 543-44. (App. A, at 10a-11a). According to the Eighth Circuit majority, Petitioner's "creation of the system that brought hoists to Missouri established sufficient minimum contacts with that forum to satisfy the due process standards set by the Supreme Court and followed by this circuit." *Id.*, at 544-45 (App. A, at 13a).[5] After balancing the competing interests of the parties, the Eighth Circuit found

5. In the Eighth Circuit's minimum contacts analysis, there was no mention of or distinction made between specific and general jurisdiction.

that the exercise of jurisdiction over Petitioner would comport with fair play and substantial justice, and therefore it reversed the district court's dismissal.

In his concurring opinion, Judge Bright rejected the majority's employment of the stream of commerce theory of specific personal jurisdiction. According to Judge Bright, "[t]he application of the stream of commerce theory would subject a foreign entity to suit in any state of the Union where the product ended up, regardless of the original destination for the article or how the particular product happened to be in a particular place in any state." *Id.*, at 546 (Bright, J., concurring). (App. A, at 17a). Instead, Judge Bright appeared to base jurisdiction on the general business activities of Petitioner's wholly-owned subsidiaries in Missouri.

Petitioner filed a timely petition for rehearing *en banc*, which was denied. (App. E, at 42a). Two judges voted to grant the petition for rehearing.

REASONS FOR GRANTING THE WRIT

The Eighth Circuit's minimum contacts analysis contained no discussion of specific or general personal jurisdiction. Due to the absence of "continuous and systematic" contacts with Missouri and the court's application of stream of commerce theory, it is apparent that the Eighth Circuit exercised specific personal jurisdiction over Petitioner. Implicit, then, in the Eighth Circuit's exercise of personal jurisdiction in this case is the finding that plaintiffs' cause of action for wrongful death "arose out of or related to" Petitioner's contacts with the state of Missouri.

This raises the following question: What ties are necessary for a cause of action to "arise out of or relate to" a defendant's contacts with the forum state, and are those ties sufficient to confer jurisdiction on a Missouri court in this case? Here, it certainly seems that decedent's death in 1996 did not arise out of or relate to Petitioner's contacts with the state of Missouri. The allegedly defective construction hoist from which decedent fell was sold by Petitioner F.O.B. Swedish port in 1972 to Esco, an Oregon-based distributor that imported the hoist into the United States via Seattle, Washington. The subject hoist ultimately made its way to Missouri via channels unknown to Petitioner and over which Petitioner exerted no control.

The question of how courts should interpret the "arising out of or related to" requirement of specific personal jurisdiction presents "an important question of federal law that has not been, but should be, settled by this Court. . ." Sup. Ct. R. 10(c). A great deal of constitutional weight rides on the interpretation and application of this phrase. *See* Lea Brilmayer, *et al.*, *A General Look at General Jurisdiction*, 66 Tex. L. Rev. 721, 736 (1988).

For these reasons, which are expounded upon below, this Court should grant Petitioner's petition for a writ of certiorari.

I.

PETITIONER LACKS THE MINIMUM CONTACTS WITH THE STATE OF MISSOURI NECESSARY TO CONFER PERSONAL JURISDICTION OVER IT IN THAT FORUM BECAUSE (1) PLAINTIFFS' CAUSE OF ACTION DID NOT "ARISE OUT OF OR RELATE TO" PETITIONER'S CONTACTS WITH MISSOURI AND (2) PETITIONER'S CONTACTS WITH MISSOURI WERE NOT "CONTINUOUS AND SYSTEMATIC" DURING THE RELEVANT TIME FRAME.

In order for a court's exercise of personal jurisdiction to comport with the Due Process Clause, the court must first engage in a two-prong constitutional analysis. First, the court must determine whether the defendant has the requisite "minimum contacts" with the forum state. Only after this requirement is satisfied will a court then determine whether the exercise of personal jurisdiction is consistent with "fair play and substantial justice." *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-77, 105 S. Ct. 2174, 2183-85, 85 L. Ed. 2d 528 (1985) (applying two-part test); *see also Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414, 104 S. Ct. 1868, 1872, 80 L. Ed. 2d 404 (1984) (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95 (1945)). This second prong is often referred to as the "reasonableness" prong of the analysis.

The "minimum contacts" prong of the due process analysis may be satisfied in one of two distinct contexts: specific personal jurisdiction and general personal jurisdiction. *See Helicopteros Nacionales de Columbia*, 466 U.S., at 414 nn. 8-9, 104 S. Ct., at 1872 nn. 8-9. "It has been

said that when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising 'specific jurisdiction' over the defendant." *Id.*, at 414 n. 8, 104 S. Ct. at 1872 n.8 (citing Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1144-1164 (1966)). On the other hand, "[w]hen a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising 'general jurisdiction' over the defendant." *Id.*, at 414-15 n.9, 104 S. Ct. at 1872-73 n.9 (citing Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev., at 1136-1144). In order to justify a court's assertion of general personal jurisdiction over a cause of action unrelated to the forum, the defendant's contacts with that forum must be "continuous and systematic." *Id.*, at 415-16, 104 S. Ct. at 1872-73; *see also Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 438, 445, 72 S. Ct. 413, 414, 418, 96 L. Ed. 485 (1952).

In the "minimum contacts" analysis of the Eighth Circuit's majority decision, it relied on the "stream of commerce" theory of specific personal jurisdiction in holding Petitioner subject to personal jurisdiction in Missouri. Although the majority did not use the phrase "specific jurisdiction" or "general jurisdiction" in its minimum contacts analysis, its use of the stream of commerce theory to reach its decision, coupled with its failure to find Petitioner's contacts to be of a "continuous and systematic" nature with the state of Missouri, conclusively demonstrates its adoption of specific jurisdiction in this case. *See Barone v. Rich Brothers Interstate Display Fireworks Company*,

25 F.3d 610, 612 (8th Cir.), *cert. denied*, 513 U.S. 948, 115 S. Ct. 359, 130 L. Ed. 2d 313 (1994) ("this case requires us to take another look at a type of specific jurisdiction (as opposed to general jurisdiction) that has been labeled 'stream of commerce.' "); *Alpine View Company Ltd v. Atlas Copco AB*, 205 F.3d 208, 216 (5th Cir. 2000) ("We have specifically rejected a party's reliance on the stream of commerce theory to support asserting general jurisdiction over a nonresident defendant.").

> Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, [the "fair warning" requirement of the Due Process Clause] is satisfied if the defendant has "purposefully directed" his activities at residents of the forum, **and** the litigation results from alleged injuries that "**arise out of or relate to**" those activities.

See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-73, 105 S. Ct. 2174, 2182, 85 L. Ed. 2d 528 (1985) (citations omitted) (emphasis added). The Eighth Circuit did find that Petitioner purposely availed itself of the privilege of conducting business in Missouri by using one or two United States distributors to distribute its products. *See Clune v. Alimak AB*, 233 F.3d 538, 544 (8th Cir. 2000) ("a foreign manufacturer that successfully employs one or two distributors to cover the United States intends to reap the benefit of sales in every state where those distributors market"). (App. A, at 12a). While Petitioner does not agree with this finding, it does at least demonstrate the majority opinion's treatment of the "purposeful availment" requirement. However, the Eighth Circuit completely

neglected the issue of whether the cause of action "arose out of or related to" Petitioner's contacts with Missouri, an issue essential to a finding of specific personal jurisdiction.

The facts as found by the Eighth Circuit illustrate that the construction hoist from which decedent fell was sold by Petitioner F.O.B. Swedish port in 1972 to Esco, an independent distributor that imported the hoist into the United States via Seattle, Washington. At the time of sale, Esco was one of two United States distributors used by Petitioner for its products. Esco, in addition to its sale of other manufacturers' products, sold Petitioner's construction hoists in thirteen western states, **not** including Missouri. Between 1972 and February 1996, the hoist somehow made its way to Missouri through channels unknown to Petitioner, and certainly not at Petitioner's direction. In February 1996, the decedent fell from the hoist and died, and his wife and children have filed suit in Missouri alleging defective design and manufacture of the hoist.

Under these facts, the following question is presented: Did plaintiffs' cause of action "arise out of or relate to" Petitioner's contacts with the state of Missouri? There is a great deal of confusion and inconsistency among the various circuits concerning the requirement that a cause of action "arise out of or relate to" the defendant's contacts with the forum state in order for a court to assert specific personal jurisdiction. *See United Elec., Radio & Machine Workers of America v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1089 (1st Cir. 1992) (noting the uncertainty among the circuits regarding the interpretation of "arising out of or related to" in specific jurisdiction jurisprudence).

On two occasions, this Court, though presented with this question, did not address it, either because another issue was dispositive of the case or because the issue was not squarely before the Court. In *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 589-90, 111 S. Ct. 1522, 1525, 113 L. Ed. 2d 622 (1991), this Court found a forum-selection clause to be dispositive of the case and therefore did not reach the issue of whether plaintiff's cause of action arose out of or related to defendant's contacts with the forum. In *Helicopteros Nacionales de Colombia v. Hall*, this Court "asserted no 'view' with respect to th[e] issue" because both parties conceded that the cause of action did not "arise out of or relate to" defendant's forum activities. 466 U.S. at 416 n.10, 104 S. Ct. 1873 n.10. In refusing to address the issue, the majority stated the following:

> Absent any briefing on the issue, we decline to reach the questions (1) whether the terms "arising out of" and "related to" describe different connections between a cause of action and a defendant's contacts with a forum, and (2) what sort of tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists. Nor do we reach the question of whether, if the two types of relationship differ, a forum's exercise of personal jurisdiction in a situation where the cause of action "relates to," but does not "arise out of," the defendant's contacts with the forum should be analyzed as an assertion of specific jurisdiction.

Id., at 416 n.10, 104 S. Ct. at 1873 n.10.

Unlike in *Carnival Cruise Lines, Inc. v. Shute* and *Helicopteros Nacionales de Colombia v. Hall*, the question concerning the proper interpretation of "arising out of or related to" in specific personal jurisdiction jurisprudence is dispositive of the jurisdictional issue presented here and is squarely before this Court. In addition, as commentators have noted, substantial constitutional weight rides on the interpretation and application of this one phrase for several reasons. *See* Lea Brilmayer, *et al.*, *A General Look at General Jurisdiction*, 66 Tex. L. Rev. 721, 736 (1988) (arguing that the determination of whether a cause of action and a defendant's contacts with the forum are "related" is crucial to jurisdictional analysis because it determines whether specific or general jurisdiction principles will be applied). First, courts usually base personal jurisdiction on a specific, rather than general, jurisdictional analysis. *See* Mary Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610, 630 (1988) (noting that general jurisdiction is rarely exercised by courts). Second, and most importantly, a finding of "minimum contacts," through either a general or a specific jurisdiction analysis, is often conclusive of the jurisdiction question. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477, 105 S. Ct. 2174, 2184-85, 85 L. Ed. 2d 528 (1985); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 116, 107 S. Ct. 1026, 1034, 94 L. Ed. 2d 92 (1987) (Brennan, J., concurring) (cases are "rare" where minimum contacts, standing alone, are insufficient for the exercise of personal jurisdiction).

A court's misinterpretation of the phrase "arising out of or related to" will result in a misapplication of due process because the phrase defines the necessary relationship between the forum state and the defendant. "[I]f courts are to recognize . . . that the limits of constitutional due process

should not vary from one court to another, courts must have a firm and consistent understanding of 'arising from or relate to.' " Mark M. Maloney, Note, *Specific Personal Jurisdiction and the "Arise From or Relate To" Requirement . . . What Does It Mean?*, Wash. & Lee L. Rev. 1265, 1271 (1993) (citing Mary Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610, 680-81 (1988) (concluding that courts' jurisdictional standards, both specific and general, must become uniform for development of sound jurisdictional practice.)).

Unfortunately, the limits of constitutional due process do fluctuate from one court to another. There is a distinct split in the circuits regarding the interpretation of the phrase "arising out of or related to" in specific jurisdiction cases. Without guidance from this Court, the circuits have applied two different interpretations and employed two different tests of "arising out of or related to": the "but-for" test and the "substantive relevance-proximate cause" test.

Under the expansive "but-for" test, also known as the "made possible by" test or the "lie in the wake of" test, a cause of action arises out of or relates to a defendant's activities in a forum state when "but for" those activities the cause of action would not have arisen. Several circuits have adopted and applied this test. *See Shute v. Carnival Cruise Lines, Inc.*, 897 F.2d 377, 382-86 (9th Cir.), *rev'd on other grounds*, 499 U.S. 585, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991) (finding that plaintiff's cause of action arose from defendant's forum state activities because "but for" those contacts, plaintiff's accident aboard defendant's cruise ship would not have occurred); *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260, 1270 (5th Cir. 1981); *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d 1209, 1215-16 (7th Cir. 1984).

In contrast, under the "substantive relevance" test, which is also known as the "proximate cause" test, the defendant's contacts with the forum state must have substantive relevance to the cause of action. In other words, the defendant's contacts with the forum must be necessary to the proof of the cause of action. *See Marino v. Hyatt Corp.*, 793 F.2d 427, 430 (1st Cir. 1986) (forum contacts must constitute "a material element of proof" for cause of action to "arise from or relate to" those contacts); *see also* Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 Sup. Ct. Rev. 77, 82 (cause of action does not arise from forum contacts unless that contact "is the geographical qualification of a fact relevant to the merits"). Several circuits have adopted and applied this test *See Pizarro v. Hoteles Concorde International*, 907 F.2d 1256, 1259-60 (1st Cir. 1990) (ruling that defendant's contacts with the forum state were insufficient because they did not constitute the proximate or legal cause of injury); *Nowak v. Tak How Investments, Ltd.*, 94 F.3d 708, 715-16 (1st Cir.), *cert. denied*, 520 U.S. 1155, 117 S. Ct. 1333, 137 L. Ed. 2d 493 (1997); *Gelfand v. Tanner Motor Tours*, 339 F.2d 317, 321-22 (2d Cir. 1964).

Supreme Court precedent supports this Court's adoption of the more limited "substantive relevance" test for determining whether plaintiffs' cause of action "arises out of or relates to" defendant's contacts with the forum. First, the "arises out of or related to" language appears to have originated in *International Shoe Co. v. Washington*, 326 U.S. 310, 319, 66 S. Ct. 154, 160, 90 L. Ed. 95 (1945), in which this Court held that the privilege of conducting activities within a state "may give rise to obligations; and, so far as those obligations **arise out of or are connected with** the activities within the state, a procedure which

requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." (Emphasis added).

A comparison of the modern phrase "arising out of or related to" with *International Shoe's* "arising out of or connected with" is instructive. If a plaintiff's cause of action is connected with a defendant's forum activities, it is also necessarily related to them. However, the reverse is not necessarily true. While a cause of action may relate to a defendant's forum activities, it is not necessarily true that the cause of action is "connected with" them. Therefore, Supreme Court precedent established in *International Shoe* seems to favor a more narrow interpretation of the phrase "arising out of or related to" used in more recent cases.

The case of *Rush v. Savchuk*, 444 U.S. 320, 100 S. Ct. 571, 62 L. Ed. 2d 516 (1980) also suggests this Court's support for the "substantive relevance" test. *See* Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 Harv. L. Rev. 1444, 1463 (1988). *Rush* involved an action for personal injuries arising from a vehicular accident in Indiana. Plaintiff filed suit in Minnesota, claiming that jurisdiction was proper because defendant's insurer did business there. In rejecting this argument, this Court concluded that only the insurance company, not the defendant, had contact with Minnesota and that the insurance policy "was not related to the operative facts of the litigation." *Rush v. Savchuk*, 444 U.S. 329, 100 S. Ct. at 578. This language "suggests support for a test of substantive relevance." *See* Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 Harv. L. Rev. at 1463.

Under the substantive relevance test, also known as the "proximate cause" test, plaintiffs' cause of action in this case did not arise out of or relate to Petitioner's contacts with Missouri. The construction hoist at issue was imported into the United States via Seattle, Washington by an independent distributor that did not market in Missouri. The hoist made its way to Missouri through unknown channels that were not controlled by Petitioner, so that it certainly could not have foreseen that the construction hoist at issue would reach Missouri. Therefore, any contact that Petitioner may have had with Missouri was not the legal or "proximate" cause of decedent's death. In other words, the contacts of Petitioner with Missouri, if any, were not substantively relevant to plaintiffs' cause of action, nor were they related to "the operative facts of the litigation." *See Rush v. Savchuk*, 444 U.S. at 329, 100 S. Ct., at 578.

Because plaintiffs' cause of action does not "arise out of or relate to" Petitioner's contacts with Missouri so as to confer specific personal jurisdiction, the Court must then look to whether Petitioner's contacts with Missouri were of a "continuous and systematic" nature so as to confer general personal jurisdiction over Petitioner. *See Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 415-16, 104 S. Ct. 1868, 1872-73, 80 L. Ed. 2d 404 (1984). A general, rather than a specific, personal jurisdiction analysis is proper here in the first place. Courts have consistently held that general personal jurisdiction analysis applies where the injurious product was sold outside the forum and brought into the forum by third persons not controlled by the defendant. *See, e.g., Terzano v. PFC*, 986 F. Supp. 706 (D.P.R. 1997) (held that an out-of state purchase of an alleged injurious product did not meet the relatedness requirement of specific jurisdiction and, therefore, general jurisdiction analysis applied).

The Eighth Circuit majority did not find contacts rising to the level of "continuous and systematic" activity with the state of Missouri. The only evidence the Eighth Circuit found with regard to Petitioner's general business activity was that "approximately 700 of [Petitioner's] construction hoists were sold in the United States by 1986. Between twenty and forty of those hoists were sold in Missouri." *Clune v. Alimak AB*, 233 F.3d at 541. (App. A at 4a). Therefore, from the time Petitioner was formed in 1947 until 1986, only twenty to forty of Petitioner's construction hoists were sold in Missouri. This certainly does not demonstrate "continuous and systematic" activity requisite for a finding of general personal jurisdiction.

Furthermore, in addition to the Eighth Circuit's failure to find "continuous and systematic" contacts, an analysis of the appropriate time frame for assessing Petitioner's contacts with Missouri for purposes of general jurisdiction reveals that any general personal jurisdiction argument made by plaintiffs must fail. "Few cases discuss explicitly the appropriate time period for assessing whether a defendant's contacts with the forum are sufficiently 'continuous and systematic' for the purposes of general jurisdiction." *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 569 (2d Cir.) (Cabranes, J.), *cert. denied*, 519 U.S. 1006, 117 S. Ct. 508, 136 L. Ed. 2d 398 (1996); *see also McMullen v. European Adoption Consultants, Inc.*, 109 F. Supp.2d 417, 419 (W.D. Pa. 2000) (referring to the "dearth of caselaw" on the subject). However, a consensus has developed in general personal jurisdiction cases wherein courts "examine a defendant's contacts with the forum state over a period that is reasonable under the circumstances -- **up to and including the date the suit was filed** — to examine whether they satisfy the 'continuous and systematic' standard."

Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d at 569-70 (emphasis added); *see also Access Telecom, Inc. v. MCI Telecommunications Corp.*, 197 F.3d 694, 717 (5th Cir. 1999) ("General jurisdiction can be assessed by evaluating contacts of the defendant with the forum over a reasonable number of years, up to the date the suit was filed."); *Haas v. A.M. King Industries, Inc.*, 28 F. Supp.2d 644, 648 (D. Utah 1998) ("As a matter of common sense consistent with the notion underlying the concept of general jurisdiction, courts usually consider the defendant's contacts for several years prior to the filing of the suit.").

In this case, plaintiffs filed suit on December 23, 1997. None of the contacts upon which the Eighth Circuit found jurisdiction existed at the time the suit was filed or during a "reasonable" period prior to the filing of suit. In fact, all of the alleged activities upon which plaintiffs base their claim for jurisdiction, and upon which the Eighth Circuit found jurisdiction, occurred somewhere between 1972, when the hoist was sold, and 1988, when Petitioner went out of the manufacturing business. Thus, plaintiffs have failed to establish that Petitioner had any contact with the state of Missouri during the relevant, "reasonable" period of time preceding the filing of suit.[6]

Even assuming *arguendo* that Petitioner was carrying on "continuous and systematic" business with the state of Missouri in 1988, which is denied, approximately ten years

6. While Petitioner does not believe the contacts its independent distributors and/or wholly owned subsidiaries had with the state of Missouri can be used to establish jurisdiction over it, *Cannon Manufacturing Company v. Cudahy Packing Company*, 267 U.S. 333, 45 S. Ct. 250, 69 L. Ed. 634 (1925), even if these contacts are used, they are so antiquated under the timing analysis as to be irrelevant.

passed before plaintiffs filed suit. No court addressing this issue has held that a ten-year period before filing suit is an appropriate and reasonable time frame in which to measure a defendant's forum contacts for general personal jurisdiction purposes. *See, e.g., Helicopteros Nacionales de Colombia v. Hall*, 466 U.S., at 409-11, 104 S. Ct. at 1868-71 (seven-year period); *Noonan v. Winston Co.*, 135 F.3d 85, 93 n.8 (1st Cir. 1998) (two-year period); *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d at 570 (six-year period); *Wilson v. Belin*, 20 F.3d 644, 650-51 (5th Cir.), *cert. denied*, 513 U.S. 930, 115 S. Ct. 322, 130 L. Ed. 2d 282 (1994) (five-year period); *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 374 (5th Cir. 1987) (five-year period); *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1329-31 (9th Cir.), *cert. denied*, 471 U.S. 1066, 105 S. Ct. 2143, 85 L. Ed. 2d 500 (1985) (three-year period); *Braman v. Mary Hitchcock Memorial Hosp.*, 631 F.2d 6, 9 (2d Cir. 1980) (five-year period).

Finally, a word about Judge Bright's concurring opinion in the Eighth Circuit is warranted. In that opinion, Judge Bright properly rejected the majority's use of stream of commerce theory of specific personal jurisdiction. Although not explicitly, and without finding the requisite "continuous and systematic" contacts, Judge Bright appeared to use general personal jurisdiction principles to support the district court's jurisdiction over Petitioner. *Clune v. Alimak AB*, 233 F.3d 538, 546 (8th Cir. 2000) (Bright, J., concurring) ("I believe, however, that the defendant through its subsidiaries was subject to jurisdiction because those subsidiaries were **doing business in Missouri**.") (emphasis added). (App. A, at 17a). Again, even assuming *arguendo* that the Petitioner's contacts with Missouri were of a "continuous and systematic" nature and that the contacts of

Petitioner's independent distributors and/or wholly owned subsidiaries with Missouri can be used to establish jurisdiction over it, proper application of a reasonable time frame preceding the filing of suit in the assessment of Petitioner's Missouri contacts for general personal jurisdiction purposes demonstrates Missouri courts' lack of general personal jurisdiction over Petitioner.

Plaintiffs' cause of action did not arise out of or relate to Petitioner's contacts with Missouri. Petitioner's contacts with Missouri were not "continuous and systematic" at any time, much less during a reasonable period of time preceding plaintiffs' filing of suit. Therefore, Missouri courts can exercise neither specific nor general personal jurisdiction over Petitioner. As a result, Petitioner's contacts with the state of Missouri were insufficient to satisfy the requirements of the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For all of the reasons identified herein, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Eighth Circuit and, ultimately, to vacate the judgment and dismiss the case for lack of personal jurisdiction.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED AND FILED DECEMBER 1, 2000

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 00-1009

Carol Clune; Paul L. Clune; Kelly M. Clune,

Plaintiffs-Appellants,

v.

Alimak AB; Alimak Elevator Company;

Defendants,

Industrivarden Service AB,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Missouri.

Submitted: September 12, 2000

Filed: December 1, 2000

Before WOLLMAN, Chief Judge, LAY and BRIGHT, Circuit Judges.

LAY, Circuit Judge.

Appendix A

In February 1996, Joseph Clune was working at a construction site in Kansas City, Missouri, for his employer, J.E. Dunn, when he fell from a construction hoist through an unenclosed area on top of the work platform.[1] He died as a result of the fall. The hoist was manufactured by Linden-Alimak AB, a Swedish corporation that designed and manufactured construction hoists and other lifts. Industrivarden Service AB ("Industrivarden") is one of two successor companies of Alimak AB. Industrivarden is a shell corporation that has no employees and does not manufacture or sell equipment. For purposes of this suit, the company exists to handle the liabilities of Linden-Alimak AB/Alimak AB. Linden-Alimak AB sold the hoist F.O.B. Swedish port to Esco Corporation ("Esco") in 1972. At the time, Esco maintained an office in Oregon and imported the hoist into the United States via Seattle, Washington.

Carol Clune, Paul Clune, and Kelly Clune ("the Clunes"), the wife and children of the decedent, brought a wrongful death suit against Industrivarden. The district court granted Industrivarden's motion to dismiss for lack of personal jurisdiction. On appeal, the Clunes argue that the exercise of personal jurisdiction in this case falls under the Missouri long-arm statute and comports with the Due Process Clause of the Fourteenth Amendment. The district court held that Industrivarden, a Swedish corporation, did not have sufficient minimum contacts with Missouri during the relevant time period to satisfy constitutional personal jurisdiction standards.

We reverse.

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1. A construction hoist is a temporary elevator-like structure used by workers during the construction of buildings.

Appendix A

A.

During the years Linden-Alimak AB/Alimak AB[2] was in business, it used distributors within the United States to sell its products in the United States. From approximately 1960 to 1970, B.M. Heede ("Heede"), a Connecticut corporation, was the exclusive distributor for Linden-Alimak AB. From 1970 to 1974, the company used two distributors for its product: Oregon-based Esco sold the hoists in thirteen western states, while Heede sold the equipment in the rest of the country, including Missouri. Both distributors also sold other manufacturers' products.[3]

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2. Herein, "Linden-Alimak AB/Alimak AB" refers to the company as it existed before it was sold in 1988. It does not include the "new" Alimak AB. Alimak AB originated in Sweden as a manufacturer of construction equipment. Through a corporate merger in 1968, the company became Linden-Alimak AB and took on business in crane manufacturing. Then in 1983, Linden-Alimak AB dropped its crane manufacturing business and the name "Linden," and became Alimak AB once again. Five years later, the company was sold in two parts. The Alimak name and most of its assets were sold to a company, which continues to manufacture and sell under the Alimak name today. This "new" Alimak AB, as it is referred to by the parties, is not involved in this lawsuit. The liabilities and some of the assets of the "old" Alimak AB were sold to Alivator AB. In 1995, Alivator AB dissolved and merged into a Swedish company called Industrivarden Service AB.

3. In 1974, Linden-Alimak AB terminated its relationship with Esco, bought a portion of Heede and made Heede its sole distributor in the United States. By 1978, Linden-Alimak AB owned all of Heede, and changed Heede's name to Linden-Alimak, Inc.

Appendix A

When Linden-Alimak AB became Alimak AB in 1983, its American subsidiary followed suit and became Alimak, Inc.[4] Alimak, Inc. continued to be the exclusive United States distributor for its Swedish parent.[5] As a result of its relationships with these distributors, approximately 700 of Linden-Alimak AB/Alimak AB's construction hoists were sold in the United States by 1986. Between twenty and forty of those hoists were sold in Missouri.

The district court found that Industrivarden was not subject to personal jurisdiction in Missouri because the company's activities were not sufficiently targeted to that state. First, the court denied jurisdiction on the stream of commerce theory, finding that Linden-Alimak AB/Alimak AB did not purposefully avail itself of the privilege of conducting business in Missouri. Second, the court failed to

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4. Linden-Alimak AB/Alimak AB and Alimak, Inc. were distinct, yet connected, companies. On one hand, Alimak, Inc. maintained its own books, paid employees through its own payroll, provided its own policies, rules and regulations, and paid for its Swedish parent's products when it purchased F.O.B. Swedish port. On the other hand, Linden-Alimak AB/Alimak AB relied solely on its subsidiary for sales in the United States and provided sales brochures with which to promote its products. Management of Alimak, Inc. went to Sweden to discuss with the parent company issues such as improvement, product support, and anticipated sales. Alimak AB also sent Swedish employees to the United States to train Alimak, Inc. service technicians.

5. From this point forward "Alimak, Inc." includes its predecessor, Linden-Alimak, Inc., and refers to the company as it existed until 1988, when its assets and liabilities were sold to separate companies.

find jurisdiction over Linden-Alimak AB/Alimak AB based on the activities of its subsidiary, Alimak, Inc. Because it did not find sufficient minimum contacts, the district court did not consider whether exercising personal jurisdiction would comport with fair play and substantial justice under the Due Process Clause.

We review a dismissal for lack of personal jurisdiction de novo. *See Stevens v. Red Wing*, 146 F.3d 538, 543 (8th Cir. 1998). To successfully challenge a dismissal for lack of personal jurisdiction, the plaintiff must make a prima facie showing that jurisdiction is proper. *See id.*

We apply a two-part test to the jurisdictional issue. First, whether the forum state's long-arm statute is satisfied, and second, whether the exercise of jurisdiction comports with due process. *See id.*

B.

The Missouri long-arm statute confers jurisdiction over nonresidents who commit tortious acts within the state. *See* Mo. Rev. Stat. § 506.500.1(3) (2000 Supp.). The Missouri Supreme Court has declared that when the Missouri legislature enacted the long-arm statute, its "ultimate objective was to extend the jurisdiction of the courts of this state over nonresident defendants to that extent permissible under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States." *State v. Pinnell*, 454 S.W.2d 889, 892 (Mo.1970) (en banc). Accordingly, Missouri courts have interpreted the statute broadly to cover those cases where the Due Process Clause permits the

assertion of personal jurisdiction. *See State v. Wiesman*, 627 S.W.2d 874, 876 (Mo.1982) (en banc) (citations omitted). Thus, the critical factor in our analysis is whether the exercise of personal jurisdiction in this case comports with due process.

The Due Process Clause establishes the parameters of a state's power to assert personal jurisdiction over a nonresident defendant. *See Helicopteros Nacionales De Colombia, S.A. v. Hall*, 466 U.S. 408, 413-14 (1984). Due process requires that the defendant "have certain minimum contacts" with the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1941)). The Supreme Court has rejected "talismanic" formulas to personal jurisdiction. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 485 (1985). Rather, we must carefully consider the facts of each case to assess the nature of the contacts between the defendant and the forum state. *See id.* at 486. The factors we weigh include:

> the burden on the defendant, the interests of the forum state in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies.

Falkirk Mining Co. v. Japan Steel Works, Ltd., 906 F.2d 369, 374 (8th Cir. 1990) (citing *Asahi Metal Indust. Co. v.*

Superior Court, 480 U.S. 102, 113 (1987) (part II.B., joined by eight Justices)). *See also Aaron Ferer & Sons Co. v. Diversified Metals Corp.*, 564 F.2d 1211, 1215 (8th Cir. 1977) (reciting factors to consider in determining whether due process is satisfied: nature and quality of defendant's contacts with the forum state; quantity of contacts; relation of the cause of action to those contacts; interest of the forum state in providing a forum for its residents; and convenience of the parties).

The baseline for minimum contacts is "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King*, 471 U.S. at 475 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). The defendant's contact with the forum state must be such that he or she "should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). In *World-Wide Volkswagen* the Supreme Court recognized that

> if the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.

Id. In other words, personal jurisdiction may be exercised consonant with due process "over a corporation that delivers

its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *Id.* at 297-98.

In its most recent discourse on the stream of commerce theory, the Court in *Asahi* debated whether a foreign manufacturer that places a product in the stream of commerce purposefully avails itself of the privilege of conducting business in a state where the product ultimately is found. Although a majority of the *Asahi* Court agreed with Justice O'Connor that jurisdiction was not proper in that case, five Justices refused to adopt her articulation of a stream of commerce "plus" theory.[6] *See* 480 U.S. at 116-22. *See also Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 614 ("In short, *Asahi* stands for no more than that it is unreasonable to adjudicate third-party litigation between two foreign companies in this country absent consent by the nonresident defendant.").

In the present case, Linden-Alimak AB/Alimak AB did more than simply set a product adrift in the international stream of commerce. The record shows Linden-Alimak AB/ Alimak AB created the distribution system that brought the hoist to Missouri. In *Barone*, we endorsed the idea that when a seller heads a distribution network it realizes "the much greater economic benefit of multiple sales in distant forums," which in turn "may 'satisfy the purposeful availment test.' " 25 F.3d at 613 (quoting *Giotis v. Apollo of the Ozarks, Inc.*,

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6. Justice O'Connor opined that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Asahi*, 480 U.S. at 112.

800 F.2d 660, 667 (7th Cir. 1986)). Barone was an American employee who was injured by a fireworks display and brought an action against the Japanese manufacturer of the fireworks. Although the manufacturer had no office, agent, or distributor in Nebraska, did not advertise in Nebraska and did not send any of its products into Nebraska, it was subject to personal jurisdiction based on the process by which its products arrived in that state. During the relevant time period, the manufacturer used nine distributors in six states. Despite the manufacturer's claim that it had no actual knowledge that one of its distributors sold products in Nebraska, "such ignorance defie[d] reason and could aptly be labeled as 'willful.' " *Id.* at 613. Its strategic choice of distributors that could reach much of the country was evidence of the manufacturer's efforts "to place its products in the stream of commerce throughout the Midwest and other parts of the country as well." *Id.* at 614. Because it was difficult to imagine that this effective distribution system was put in place by chance, the manufacturer could not plead ignorance that its products were being distributed into neighboring states. *See id.* at 613-14. When a foreign manufacturer reaps the benefits of a distribution network in this way, "it is only reasonable and just that it should . . . be held accountable in the forum of the plaintiff's choice . . . ." *Id.* at 615.

Recently we applied the rule of *Barone* in *Vandelune v. 4B Elevator Components Unlimited*, 148 F.3d 943 (8th Cir. 1998), where a worker who was injured in a grain dust explosion in Iowa brought a products liability action against the British manufacturer of a safety device used in the grain elevator. Although the manufacturer in *Vandelune* had no office, agent, employee, property, or advertising or

solicitation campaigns in Iowa, we found that the lack of a direct marketing presence did not necessarily mean that the manufacturer had not purposefully marketed its product in that state. *See id.* at 948. The following facts led to the conclusion that there were sufficient contacts to support jurisdiction in that case: (1) the appellee designed the product at issue for the United States market; (2) the appellee agreed to distribute its product through affiliates located in the United States; (3) the appellee put its logo and identifying decals on the product; (4) the appellee directly shipped some of its products to a distributor in nearby Illinois; (5) the appellee's employees attended technical support meetings at the distributor's Illinois facilities; and (6) the appellee sold 619 units to an Illinois distributor, 81 of which were resold in Iowa. *See id.*

The facts alleged by the Clunes are similar to those in *Vandelune*. Linden-Alimak AB/Alimak AB designed its construction hoists for the United States market. The company had exclusive distribution agreements with United States distributors.[7] The Swedish parent's logo was displayed on products that were sold in the United States. Linden-Alimak AB/Alimak AB also conducted training seminars in the United States for technicians employed by Alimak, Inc. who serviced hoists that were sold by the subsidiary. Of the 700 construction hoists that were sold in the United States

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7. It is worth nothing that the only way a customer in the United States could acquire a Linden-Alimak AB/Alimak AB construction hoist was through the company's exclusive United States distributor. If a customer directly contacted Linden-Alimak AB/Alimak AB, the parent would refer that customer to Alimak, Inc. in the United States.

by the company's distributors, between twenty and forty ended up in Missouri. This fact alone makes it difficult for us to characterize the hoist's location in Missouri as random, attenuated or fortuitous. *See Burger King*, 471 U.S. at 475. Additionally, the Swedish parent provided sales brochures and instruction manuals to its distributors for use in promoting and servicing its products in the United States. Members of the Swedish parent's board of directors also served as directors of its subsidiary. Any of these facts, taken alone, might fall short of purposeful availment, however, when taken together they show that Linden-Alimak AB/ Alimak AB engaged in a series of activities that were designed to generate profits to the parent from its subsidiaries' sales across the United States.[8]

The district court concluded that Industrivarden could not be subject to personal jurisdiction under *Vandelune*

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8. Industrivarden insists that any contacts its predecessor companies had with Missouri were outside of the time period that is material to the issue of personal jurisdiction. Industrivarden cites a string of cases to support its assertion that minimum contacts must occur at the time the cause of action arose, the time the suit is filed, or a reasonable period of time immediately prior to the filing of the lawsuit. *See* Brief for Appellee at 15-16. According to Industrivarden, the contacts alleged by the Clunes occurred before 1988, which is outside of the window of personal jurisdiction opportunity for the 1996 incident that gave rise to this case. Although Industrivarden is correct in its statement of the chronological rule, its conclusion cannot stand. Linden-Alimak AB/Alimak AB was "present" in Missouri from the time the crane entered Missouri until the time that product ceased to exist in that state. Because the crane must have been present at the time Joseph Clune fell from it, the timing of the contacts was proper for personal jurisdiction purposes.

because Linden-Alimak AB/Alimak AB did not send its product "into a regional distributor with the expectation that the distributor [would] penetrate a discrete, multi-State trade area." 148 F.3d at 948. Although we can imagine a case where a foreign manufacturer selects discrete regional distributors for the purpose of penetrating the markets in some states to the exclusion of others, that situation is not before us. The record shows that Linden-Alimak AB/Alimak AB did not seek to limit the states or regions where their construction hoists would be sold. Rather, it utilized distributors that had sales territories across the United States. A foreign manufacturer that successfully employs a number of regional distributors to cover the United States intends to reap the benefits of sales in every state where the distributors market. Similarly, a foreign manufacturer that successfully employs one or two distributors to cover the United States intends to reap the benefit of sales in every state where those distributors market. The difference is one of form, not function, and the practical effect is the same.

We are not persuaded by Industrivarden's argument that it was unaware of what happened to its products after they left Swedish port. "[S]uch ignorance defies reason and could aptly be described as 'willful.' " *Barone*, 25 F.3d at 613. *See also id.* at 613 n.4 (explaining how the distinction between what the defendant knew and should have known is immaterial to the personal jurisdiction analysis). If we were to conclude that despite its distribution system, Linden-Alimak AB/Alimak AB did not intend its products to flow into Missouri, we would be bound to the conclusion that the company did not intend its products to flow into *any* of the United States.

Appendix A

The facts show that Linden-Alimak AB/Alimak AB purposefully directed its products to the United States through the distribution system it set up in this country. The company knew that by virtue of this system, its construction hoists entered the Missouri and other Midwest markets. Linden-Alimak AB/Alimak AB's creation of the system that brought hoists to Missouri established sufficient minimum contacts with that forum to satisfy the due process standards set by the Supreme Court and followed by this circuit.[9]

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9. Industrivarden asserts that the present case comports with post-*Asahi* Eighth Circuit decisions where we have denied jurisdiction over foreign defendants. We disagree.

In *Gould v. P.T. Krakatau Steel*, 957 F.2d 573 (8th Cir. 1992), an Indonesian-based defendant entered into a sales contract with a United States distributor, F.O.B. Indonesia. The distributor accepted delivery of the products in Indonesia, transported the products to the United States, and sent a portion of the products to the plaintiff's employer in Arkansas. *See id.* at 575. The plaintiff later was injured while unpacking the products. *See id.* In affirming the dismissal by the district court, we found insufficient contacts based on a number of factors, including that the defendant was not licensed to do business in Arkansas, did not have any office, agent, property, bank accounts, or operations in the state, and did not advertise or solicit any business there. *See id.* at 576.

As an initial matter, *Gould* involved a commercial dispute between merchants, which is distinct from the Clune's personal injury claim against Industrivarden. *See Guinness Import Co. v. Mark VII Distributors, Inc.*, 153 F.3d 607, 615 n.7 (8th Cir. 1998) (noting the incongruity between personal injury claims and commercial disputes). More importantly, *Gould* involved a limited transaction in the international marketplace. *See* 957 F.2d at 576. That fact sharply contrasts with the record in the present case, which contains

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Appendix A

With minimum contacts satisfied, we must next balance those contacts with the burden on Industrivarden of defending

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evidence of continuous transactions between Linden-Alimak AB/ Alimak AB and its United States distributors.

In *Falkirk*, 906 F.2d 369 (8th Cir. 1990), a workman in North Dakota was injured while using a defective cam manufactured by the defendant, a foreign company. This court held personal jurisdiction over the alien corporation was precluded by insufficient contacts. *See id.* at 376. The foreign manufacturer's officials never visited North Dakota to inspect the site where the defective cam was installed and it did not negotiate the contract of sale or discuss design specifications with the plaintiff. *See id.* at 375. There was no evidence that the manufacturer had any knowledge it was manufacturing cams that were to be installed in North Dakota. *See id.* Accordingly, we determined that the manufacturer "did nothing more than place its products in the stream of commerce," and concluded that the interest of the plaintiff was best vindicated by an action against the importer, which was the party with whom the manufacturer shared a direct contractual relationship. *See id.* at 376.

Linden-Alimak AB/Alimak AB's activities cannot be characterized as amounting to "nothing more than place its products in the stream of commerce." *Falkirk*, 906 F.2d at 376. Contrary to the defendant in *Falkirk*, who was totally without information about the ultimate destination of its product, Linden-Alimak AB/Alimak AB, at minimum, had constructive knowledge that its construction hoists would end up in Missouri. The parent knew that by 1986, 20 to 40 hoists were sold into the state. Also, the intermingling of directors and officers between Linden-Alimak AB/Alimak AB and Alimak, Inc. suggests that the parent was aware of its subsidiary's activities. *See e.g.*, *Iota Management Corp. v. Boulevard Investment Co.*, 731 S.W.2d 399, 410 (Mo. App. 1987) (corporation is charged with knowledge of its officers and agents).

itself in Missouri, the interest of Missouri in adjudicating the dispute, the Clunes' interest in obtaining the most efficient resolution of this matter, the judicial system's interest in obtaining the most efficient resolution of this matter, and the shared interest of the several states in furthering fundamental substantive social policies. *See Falkirk*, 906 F.2d at 369.

The Supreme Court has noted that "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *See Asahi*, 480 U.S. at 114 (part II.B., joined by eight Justices). As we have noted, Industrivarden is a shell corporation that has no employees or products to sell. Essentially, the company exists through its insurance company. The overwhelming majority of the evidence in this case will be found in Missouri or the surrounding area, such as the construction hoist, eyewitnesses, medical records, and documents material to the incident. As a result, Industrivarden would have to come to Missouri to investigate and gather evidence no matter where a trial were to take place. With the help of modern technology and transportation, Industrivarden easily will be able to collect any relevant documents that are in Sweden and transport them to the United States. For these reasons, any burden Industrivarden might undertake in defending itself in Missouri will be minimal.

It is readily apparent that Missouri has the strongest interest of any forum in adjudicating this dispute. The accident that gave rise to this case occurred in Missouri.

Appendix A

Joseph Clune was an employee of the Missouri company, he worked and paid taxes in that state, and his death occurred there as a result of a product sold in that forum. No other state has a more compelling connection to this case.

The Clunes' interest in obtaining convenient and effective relief is best satisfied by adjudicating this dispute in Missouri. Although they are residents of Kansas, Kansas is not a viable venue for this case and Missouri is the closest choice. In any event, Missouri is abundantly more convenient for the Clunes than if this case were to be tried in Sweden. Our decision today in no way guarantees the Clunes success in this suit. However, it likely would be impossible for this family of three who has lost their husband and father to travel abroad to seek restitution for his death.

Trying this case in Missouri federal court also satisfies the judicial system's interest in obtaining the most efficient resolution of this controversy. We exercise caution when subjecting a foreign corporation to jurisdiction in the United States, but are satisfied that Linden-Alimak AB/Alimak AB affirmatively took on the risk of liabilities here.

Finally, the adjudication of this dispute in Missouri ensures the fundamental social policy of safety in goods that enter our marketplace. As commercial borders are dismantled in the increasingly global marketplace, more products are available to consumers in the United States. It is essential that our laws designed to protect the health and safety of human beings not be lost in this flurry of commerce.

The judgment of dismissal by the district court is vacated and the cause is remanded for further proceedings.

BRIGHT, Circuit Judge, concurring.

I concur in the result only.

I do not agree with the stream of commerce theory of the majority. Initially the Swedish manufacturer, Linden-Alimak AB, shipped the construction hoist F.O.B. Swedish port to the Pacific Northwest in the United States. The hoist apparently came into Missouri via a contractor. The application of the stream of commerce theory would subject a foreign entity to suit in any state of the Union where the product ended up, regardless of the original destination for the article or how the particular product happened to be in a particular place in any state.

I believe, however, that the defendant through its subsidiaries was subject to jurisdiction because those subsidiaries were doing business in Missouri. Its subsidiaries, Linden-Alimak Inc. and Alimak Inc., were incorporated in the State of Connecticut. They both held certificates of authority to conduct business in the State of Missouri. They employed sales representatives to cover multi-state territories. These sales representatives sold their companies' products in Missouri.

Courts in the Eighth Circuit have held that they can only assert personal jurisdiction over a foreign parent corporation based on the activities of its resident subsidiary when the parent corporation dominates and controls the subsidiary to the point that the two companies no longer maintain corporate formalities. *See Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Mgmt., Inc.*, 519 F.2d 634, 638 (8th Cir. 1975).

Appendix A

The district court in the instant case found that the Clunes have not produced any evidence to show that Industrivarden controlled, or had any influence over, its distributors' and subsidiaries' marketing and sales decisions. The district court also noted that the Clunes failed to show that the distributors and subsidiaries were selling in Missouri under the expectations of Industrivarden. Therefore, the district court refused to base jurisdiction over Industrivarden on the activities of its distributors and subsidiaries.

The district court ignored evidence that suggests that Industrivarden exercised control over its subsidiaries' marketing and sales decisions. Industrivarden produced sales brochures which were distributed to residents and consumers in Missouri by its distributors and subsidiaries. At least three members of the subsidiary's board of directors were also directors of the foreign manufacturer. Pursuant to Missouri law, Mo. Rev. Stat. § 351.310 (1986), these directors of the subsidiary "controlled and managed" the business of the subsidiary. These directors made no effort to exclude Missouri from its United States sales. At least two of the directors of the subsidiary were also officers of the foreign manufacturer. Courts have found that [illegible] be an important factor in determining whether there are [illegible]fficient minimum contacts. *See Hawes v. Honda Motor Co., Ltd.*, 738 F.Supp. 1247, 1251 (E.D. Ark. 1990). Under Missouri law, a corporation is charged with the knowledge of its officers and agents. *Iota Mgmt. Corp. v. Boulevard Inv. Co.*, 731 S.W.2d 399, 410 (Mo. App. 1987). Consequently, the foreign manufacturer had knowledge, through its officers and directors, of all of its subsidiary's contacts, sales, and marketing.

Appendix A

Because of the absence of evidence regarding the issue, I do not here hold that the foreign manufacturer and its subsidiaries are so tightly related that the subsidiaries are mere alter-egos of the parent. Rather, I simply refer to the relationship to support our conclusion that without the existence of its subsidiaries, Industrivarden would not be able to distribute its product in the United States. This connection between the foreign manufacturer and the resident subsidiary represents more than simply placing a product into the stream of commerce.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION DATED AND FILED DECEMBER 3, 1999

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

No. 98-0179-CV-W-1

CAROL CLUNE, et al.,

Plaintiffs,

v.

INDUSTRIVARDEN SERVICE AB,

Defendant.

ORDER

On October 27, 1999, the Court held that it could not exercise personal jurisdiction over Defendant Industrivarden Service AB, a Swedish corporation that has never, itself or through its predecessor corporations, sold products in Missouri, marketed in Missouri, serviced products in Missouri, directed advertising toward Missouri, or used distributors targeted toward penetrating the Missouri market. *See* Order at 10-13 (October 27, 1999). Plaintiffs Carol Clune, Paul Clune, and Kelly Clune ("the Clunes") understandably disagree with the Court's Order. They have moved the Court to alter, amend, or reconsider its Judgment,

or, alternatively, to vacate the Judgment to allow them time for further discovery on the jurisdictional issue. The Clunes have also requested the Court hold a hearing on their motion.

The Court has carefully considered the facts and reasoning cited by the Clunes in support of their argument that the Court's Judgment is flawed. The Clunes apparently believe that this Court should overlook Supreme Court decisions since 1980 that have clarified the law with respect to exercising personal jurisdiction based on a foreign manufacturer's placement of its products in the international "stream of commerce".[1] The Court declines to ignore controlling Supreme Court precedent.

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1. The Supreme Court has limited the overbroad application of the stream of commerce theory since *Benn v. Linden Crane Co.*, 326 F. Supp. 995, 996 (E.D. Pa. 1971) ("Linden-Alimak manufactured and sold a crane f.o.b. Swedish port to a purchaser that had exclusive control over shipment . . . to the U.S. Linden-Alimak had reason to know that the crane would be resold for ultimate use and operation in the U.S. . . . I find that Linden-Alimak was 'doing business' [in Pennsylvania]."), and *Boykin v. AB Lindenkraner*, 252 So. 2d 467, 469 (La. Ct. App. 1971) ("The manufacturer here is aware that the independent intermediary Heede sells its cranes for use in the U.S. The only reasonable conclusion is that the manufacturer intends that its cranes shall be sold for use in the U.S., including every state in which the [distributor's] efforts may produce the desired results."). *See World Wide Volkswagen v. Woodson*, 444 U.S. 286, 297-98, 100 S. Ct. 559, 567, 62 L. Ed. 2d 490 (1980) ("But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State; . . . the mere unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with

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Appendix B

Additionally, the Clunes would have this Court ignore the Eighth Circuit's careful distinction between cases where a foreign manufacturer merely places its products into the national or international stream of commerce and cases where the manufacturer "pours its products into a regional distributor with the expectation that the distributor will penetrate a discrete, multi-State trade area." In the former situation, which exists in the instant case, controlling law dictates that the manufacturer's contacts with the forum state are "attenuated, random, or fortuitous" and forum state courts cannot exercise personal jurisdiction over the manufacturer. *See* Order at 11 (October 27, 1999); *Asahi*, 480 U.S. at 109, 107 S. Ct. at 1030; *Gould v. P.T. Krakatau Steel*, 957 F.2d 573, 576 (8th Cir.), *cert. denied*, 506 U.S. 908, 113 S. Ct. 304, 121 L. Ed. 2d 227 (1992). In the latter situation, which existed in *Vandelune v. 4B Elevator Components Unlimited*, 148 F.3d 943, 948 (8th Cir. 1998) and *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 615 (8th Cir. 1994), the manufacturer is deemed to have purposefully

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the forum State.") (internal quotations and citations omitted); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76, 105 S. Ct. 2174, 2184, 85 L. Ed. 2d 528 (1985) ("This purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person.") (internal quotations and citations omitted); *Asahi Metal Indus. Co. v. Superior Ct. of Calif.*, 480 U.S. 102, 109, 107 S. Ct. 1026, 1030, 94 L. Ed. 2d 92 (1987) ("A defendant's awareness that the stream of commerce may or will sweep the product into the forum state does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum state.").

availed itself of the laws of the forum state. The Court finds itself bound by the distinction clearly set forth in this controlling case law.

In summary, the Court finds no legally sound reason why it should alter or amend its Judgment in this case. Neither a hearing nor further discovery will alter the controlling precedent and legal reasoning with which the Clunes disagree. Accordingly, the Clunes' motions are DENIED.

IT IS SO ORDERED.

s/ Dean Whipple
Dean Whipple
United States District Court

Date Dec. 3, 1999

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION DATED AND FILED OCTOBER 27, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 98-0179-CV-W-1

CAROL CLUNE, et al.,

Plaintiffs,

v.

INDUSTRIVARDEN SERVICE AB,

Defendant.

ORDER

Plaintiffs Carol Clune, Paul Clune, and Kelly Clune ("the Clunes") have sued Defendant Industrivarden Service AB ("Industrivarden") to recover damages for the death of their husband and father, Joseph Clune, who fell from a construction hoist manufactured by Industrivarden's predecessor corporation. Industrivarden has moved the Court for an Order dismissing the case against it for lack of personal jurisdiction [Does. # 5, 6]. The Clunes have moved for an extension of time to respond [Doc. # 32], and, in conjunction with their now-filed response, for leave to exceed the page limitation of Local Rule 7.1(f) [Doc # 34]. Industrivarden

has filed its reply brief with a similar motion for leave to exceed the page limit [Doc. # 36]. The Clunes have objected to Industrivarden's motion; they have requested an additional fifteen surreply pages if the Court grants Industrivarden's motion to exceed the page limit in its reply brief [Doc. # 39]. The Clunes have also moved for leave to amend their complaint [Doc. #31].

The Clunes' motion for an extension of time, to which Industrivarden consented, is GRANTED for good cause. The Court also GRANTS the Clunes' and Industrivarden's motions to exceed the page limit in the Clunes' suggestions in opposition and Industrivarden's reply. The Court DENIES the Clunes' motion for leave to file a surreply brief. The Court finds that the length of the parties' arguments only detracts from their merits. For the following reasons, Industrivarden's motion to dismiss for lack of personal jurisdiction is GRANTED and the Clunes' motion to amend is MOOT.

I. INDUSTRIVARDEN'S MOTION TO DISMISS

A. Factual Background

1. The Accident and The Elevator.

The Clunes are residents of Kansas. Their husband and father, Joseph Clune, died in downtown Kansas City, Missouri when he fell from an elevator at a construction site in February 1996. Joseph Clune was working on the construction site for his employer, J.E. Dunn, when the accident occurred. The elevator, otherwise known as a

construction hoist, was manufactured by Linden-Alimak AB, a Swedish corporation. In 1972, Linden-Alimak AB sold the elevator F.O.B. Swedish port to Esco Corporation ("Esco"). At that time, Esco maintained an office in Oregon. Esco exported the elevator out of Sweden and imported it into the United States via Seattle, Washington. The parties have not and purportedly cannot show who or what entities owned and operated the elevator between its importation by Esco in 1972 and Joseph Clune's accident.[1]

2. Linden-Alimak AB and Its Successor Corporations.

Linden-Alimak AB was, for all purposes relevant to this case, incorporated in Sweden in 1947. Industrivarden, a completely separate corporation, was incorporated in Sweden in 1986. In 1984, Linden-Alimak AB dropped its crane manufacturing business and the name "Linden." The company became Alimak AB. In 1987, a separate company purchased the Alimak AB name and most of its assets. "Alimak AB" still exists today, but the company that operates

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1. While the Clunes' contend that J.E. Dunn, Joseph Clune's employer, purchased the elevator from Remco Rental Machinery Company, a company located in Overland Park, Kansas, this contention is based on inadmissible hearsay contained in the deposition testimony of Ulf Uno Lundell. *See* Plaintiffs Exhibit B, Lundell Deposition at 128-131. Evidence presented to oppose a motion to dismiss or motion for summary judgment must be admissible. *See e.g. American Airlines, Inc. v. KLM Royal Dutch Airlines, Inc.*, 114 F.3d 108, 110-11 (8th Cir. 1997) (summary judgment); *Encore Productions, Inc. v. Promise Keepers*, 53 F. Supp. 2d 1101, 1115 (D. Colo. 1999) (motion to dismiss for lack of personal jurisdiction). Even if admissible, however, this evidence does not help establish Industrivarden's contacts with Missouri.

under that name is not currently involved in this lawsuit. The liabilities (and some of the assets) of the old Alimak AB (1984-1987) were assumed by a company called Alivator AB in 1987. In 1995, Alivator AB was merged into Industrivarden. To avoid confusing the existing Alimak AB, which is not involved in this suit, with the old Alimak AB (1984-1987), which stands in the chain of successor liability from Linden-Alimak AB to Industrivarden, the Court will not again refer to Alimak AB. Instead, the Court will refer to all the companies in Linden-Alimak AB's chain of successor liability as "Linden-Alimak AB/Industrivarden." Neither Linden-Alimak AB nor any of the companies in its chain of successor liability has ever filed for foreign corporate status in Missouri, had a registered agent in Missouri, employed sales representatives to visit Missouri, or conducted any direct business with Missouri residents.

3. Linden-Alimak AB's Distributors.

Prior to 1974, Linden-Alimak AB sold its construction hoists to independent United States distributors. These distributors purchased the elevators in Sweden, imported them into the United States, and then sold them. From approximately 1960 to 1970, Linden-Alimak AB's exclusive distributor in the United States was a company called B.M. Heede, or Heede International, Inc. ("Heede"). Heede was located in Connecticut and sold its products, including Linden-Alimak AB elevators, across the United States. Heede employed sales representatives to cover certain territories, which included Missouri and Kansas City. Heede sold to both end users and companies with which it had

independent distributorship agreements. One of those companies was Remco Rental Machinery Company in Overland Park, Kansas ("Remco").

From 1970 to 1974, Linden-Alimak AB split its distribution arrangement between Heede and Esco. During that time, Esco sold Linden-Alimak AB elevators in thirteen western states and Heede sold Linden-Alimak AB elevators in the rest of the United States, including Missouri. Plaintiffs have not produced any evidence to show that Linden-Alimak AB/Industrivarden's distributors, Esco and Heede, or even its distributors' sub-distributors, like Remco, ever sold Linden-Alimak AB/Industrivarden elevators exclusively or on consignment. Esco and Heede always purchased the elevators in Sweden; all distributors also sold other manufacturer's products.

4. Linden-Alimak AB's Subsidiaries.

In 1974, Linden-Alimak AB apparently terminated its relationship with Esco. In addition, Linden-Alimak AB bought a portion of Heede that same year and made Heede its exclusive distributor in the United States. By 1978, Linden-Alimak AB had purchased all of Heede and changed the Heede company name to Linden-Alimak Inc. After Linden-Alimak AB dropped "Linden" and became Alimak AB in 1984, Linden-Alimak Inc. followed suit and changed its name to Alimak Inc. Linden-Alimak Inc. was a wholly owned subsidiary of Linden-Alimak AB; Alimak Inc. was a wholly owned subsidiary of Alimak AB. Both operated, in succession, as Linden-Alimak AB/Industrivarden's sole distributor in the United States.

Appendix C

Linden-Alimak Inc. and Alimak Inc. were incorporated in the State of Connecticut. They both operated an office in Connecticut for the distribution and sale of their products, which included Linden-Alimak AB/Industrivarden elevators. Linden-Alimak Inc. and Alimak Inc. both held certificates of authority to conduct business in the State of Missouri. Like Heede did before them, Linden-Alimak Inc. and Alimak Inc. employed sales representatives to cover multi-state territories. These sales representatives sold their companies' products in Missouri. The Clunes' evidence shows that Alimak Inc. sold several Linden-Alimak AB/Industrivarden elevators directly to J.E. Dunn in Missouri during the mid-1980's. After 1988, the activities of Linden-Alimak Inc. and Alimak Inc. are not important, because at that time they became wholly owned subsidiaries of a different Swedish company.

B. Discussion

When a defendant challenges a federal court's jurisdiction, the plaintiff bears the burden of proving that jurisdiction exists. *See Moog World Trade Corp. v. Bancomer*, 90 F.3d 1382, 1384 (8th Cir. 1996). If a motion to dismiss for lack of personal jurisdiction is submitted prior to trial on the basis of affidavits and other written materials, as here, then the plaintiff is only required to make a prima facie showing to avoid dismissal.[2] *See Aaron Ferer & Sons Co. v. Diversified*

2. At least one circuit imposes a heavier burden of proof — preponderance of the evidence — when, as here, the parties have been allowed to conduct discovery on the jurisdictional issue. *See Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*, 751

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Metals Corp., 564 F.2d 1211, 1215 (8th Cir. 1977). The plaintiff must show that (1) the defendant is subject to the court's jurisdiction under the state long-arm statute, and (2) the court's exercise of that jurisdiction comports with due process. *See Moog World Trade Corp.*, 90 F.3d at 1384. The Court must resolve all factual disputes in the plaintiff's favor. *See Aaron Ferer & Sons Co.*, 564 F.2d at 1215.

1. Jurisdiction Under Missouri's Long-Arm Statute.

As pertinent here, Missouri's long-arm statute confers jurisdiction over "any cause of action arising from . . . (1) [t]he transaction of any business within this state [or] . . . (3) [t]he commission of a tortious act within this state." Mo. Rev. Stat. § 506.500.1. The statute also provides that "[o]nly causes of action arising from [these] acts . . . may be asserted against a defendant in an action in which jurisdiction over him is based upon this section." *Id.* at § 506.500.3. The Missouri Supreme Court has long held that § 506.500 extends the jurisdiction of Missouri courts "over nonresident defendants to the extent permissible under the due process clause of the fourteenth amendment of the [United States]

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F.2d 117, 120 (2d Cir. 1984); *Landoil Resources Corp. v. Alexander & Alexander Servs., Inc.*, 918 F.2d 1039, 1043 (2d Cir. 1990). The Eighth Circuit has also indicated that a heavier burden may be appropriate in such circumstances. *See Block Industries v. DHJ Industries, Inc.*, 495 F.2d 256, 259 n.3 (8th Cir. 1974). The Court was unable to find any controlling precedent applying the preponderance burden, however, and Industrivarden does not argue for it. Accordingly, the Court will only require a prima facie showing from the Clunes.

constitution." *State ex rel. K-Mart Corporation v. Holliger*, 986 S.W.2d 165, 167-68 (Mo. banc 1999) (quoting *State ex rel. Deere & Co. v. Pinnell*, 454 S.W.2d 889, 892 (Mo. banc 1970)). The statutory requirement that limits jurisdiction to causes of action arising from the nonresident defendant's contacts with Missouri codifies the principle of specific jurisdiction. *See Moog World Trade Corp. v. Bancomer*, 90 F.3d 1382, 1384 (8th Cir. 1996); *Scullin Steel Co. v. National Ry. Utilization Corp.*, 676 F.2d 309,312 (8th Cir. 1982); *State ex rel. K-Mart Corporation*, 986 S.W.2d at 168. Both § 506.500 and constitutional principles of due process dictate that unless the nonresident defendant's contacts with Missouri are so significant as to make it subject to the general jurisdiction of Missouri courts, the cause of action on which jurisdiction is based must "arise out of or relate to" the defendant's limited activities in the state. *Id. See also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S. Ct. 2174, 2182, 85 L. Ed. 2d 528 (1985).

2. Jurisdiction Under Constitutional Due Process Standards.

The due process clause of the fourteenth amendment requires that there be minimum contacts between the defendant and the forum state such that the court's exercise of jurisdiction over the defendant does not offend traditional notions of fair play and substantial justice. *See Moog World Trade Corp.*, 90 F.3d at 1384 (citing *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 291, 100 S. Ct. 559, 564, 62 L. Ed. 2d 490 (1980)). "Sufficient contacts exist when 'the defendant's conduct and connection with the forum state are such that [it] should reasonably anticipate being haled into

court there.' " *Moog Word Trade Corp.*, 90 F.3d at 1384 (quoting *World-Wide Volkswagen*, 444 U.S. at 297, 100 S. Ct. at 567). In assessing the defendant's reasonable anticipation, the court must find "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Id.*; *see also Asahi Metal Indus. Co. v. Superior Ct. of Calif.*, 480 U.S. 102, 109, 107 S. Ct. 1026, 1030, 94 L. Ed. 2d 92 (1987).

3. Jurisdiction Over Manufacturers Based on Stream of Commerce.

When jurisdiction over the defendant is predicated upon the defendant's placing its products into the "stream of commerce," the "purposeful availment" requirement ensures that a nonresident defendant will not be haled into a jurisdiction solely because its product ended up in the forum state on an "attenuated, random, or fortuitous" basis. *See Vandelune v. 4B Elevator Components Unlimited*, 148 F.3d 943, 948 (8th Cir. 1998) (citing *World-Wide Volkswagen*, 444 U.S. at 296-97, 100 S. Ct. at 567, and *Burger King Corp.*, 471 U.S. at 475, 105 S. Ct. at 2183). Thus, "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposely directed toward the forum state." *Asahi Metal Indus. Co.*, 480 U.S. at 112, 107 S. Ct. at 1032. "[A] defendant's awareness that the stream of commerce may or will sweep the product into the forum state does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum state." *Id.*

Accordingly, to assert jurisdiction over a nonresident defendant based on the stream of commerce theory, a court must find that the defendant engaged in some activity that indicated an "intent or purpose to serve the market in the forum state." *Id.* In *Asahi Metal Indus. Co.*, the Supreme Court provided a non-exclusive list of examples of such activities: "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." 480 U.S. at 112, 107 S. Ct. at 1032.

Similarly, Missouri courts have held that

> the sale or distribution of a product of a manufacturer must arise from the efforts of the manufacturer to serve the market for the product in the forum state and the manufacturer must market and deliver its product into the stream of commerce with the expectation that the products will be sold in the forum state.

Pohlmann v. Bil-Jax, Inc., 954 S.W.2d 371, 373 (Mo. Ct. App. 1997) (citing *Welkener v. Kirkwood Drug Store Co.*, 734 S.W.2d 233, 239 (Mo. Ct. App. 1987)). The Eighth Circuit Court of Appeals has found that manufacturers meet the purposeful availment requirement when they have "poured [their] products into a regional distributor with the expectation that the distributor will penetrate a discrete, multi-State trade area." *Vandelune v. 4B Elevator Components*

Unlimited, 148 F.3d 943, 948 (8th Cir. 1998) (citing *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 615 (8th Cir. 1994)).

4. Jurisdiction Over A Parent Company Based On Activities of the Subsidiary.

Keeping in mind the manufacturer-distributor relationship and the findings necessary for assertion of jurisdiction over a nonresident manufacturer, the Court must also examine when it is appropriate to assert personal jurisdiction over a nonresident corporate defendant based on the activities of its wholly owned subsidiary. Oddly, the applicable standards for these two situations seem inconsistent. In the case of a parent-subsidiary, courts have held that they cannot exercise personal jurisdiction over the parent corporation based on the activities of its subsidiary merely because the parent owns all of the subsidiary's stock. *See Cannon Manufacturing Company v. Cudahy Packing Company*, 267 U.S. 333, 335-36, 45 S. Ct. 250, 251, 69 L. Ed. 634 (1925); *Escude Cruz v. Ortho Pharmaceutical Corp.*, 619 F.2d 902, 905 (1st Cir. 1980); *Lakota Girl Scout Council, Inc. v. Havey Fund-Rais. Man., Inc.*, 519 F.2d 634, 637 (8th Cir. 1975). Moreover, it is insufficient for a plaintiff to point out normal elements of corporate control by a parent company over its subsidiary to support jurisdiction over the parent. *See United States v. Bliss*, 108 F.R.D. 127, 131 (E.D. Mo. 1985). "The officers of any corporation that owns the stock of another necessarily exercise a considerable degree of control over the subsidiary corporation and the discharge of that supervision alone is not enough to subject the parent to [personal] jurisdiction." *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*, 751 F.2d 117, 120 (2d Cir. 1984).

Thus, a plaintiff must produce something more than mere evidence of the parent-subsidiary relationship to support the assertion of jurisdiction. Courts in the Eighth Circuit have held that they can only assert personal jurisdiction over a foreign parent corporation based on the activities of its resident subsidiary when the parent corporation dominates and controls the subsidiary to the point that the two companies no longer maintain corporate formalities. *See Lakota Girl Scout Council, Inc. v. Havey Fund-Rais. Man., Inc.*, 519 F.2d 634, 637 (8th Cir. 1975) (asserting personal jurisdiction over an individual based on his company's activities because he "dominated and controlled the business and treated it as his own"); *United States v. Bliss*, 108 F.R.D. 127, 131 (E.D. Mo. 1985) ("At least, plaintiff must demonstrate that defendants did not maintain corporate formalities."); *In re North Dakota Personal Injury Asbestos Litigation No. 1*, 737 F. Supp. 1087, 1094-95 (D. N.D. 1990) ("Personal jurisdiction can thus be properly asserted over a corporation if another is acting as its alter ego, even if that alter ego is another corporation."); *Scott v. Mego Intern., Inc.*, 519 F. Supp. 1118, 1125-26 (D.C. Minn. 1981) ("In order for the parent company to subject itself to jurisdiction by virtue of its subsidiary's activities, the companies must be organized and operated so that the one corporation is an instrumentality or adjunct of the other corporation.").

In cases where the subsidiary is acting as distributor for the products of the parent, application of the parent-subsidiary standard appears to be more difficult for a plaintiff than application of the standard used in manufacturer-distributor cases. Compare: When a manufacturer "pours its

products" into a regional distributor (that is an entirely separate company) with the expectation that the distributor will penetrate a multi-State trade area, it has purposefully availed itself of the laws of the states in that area. *Vandelune*, 148 F.3d at 948. If, however, the same manufacturer purchases the regional distributor, making it a wholly owned subsidiary, but maintains a separate corporate existence and does not make the subsidiary its instrumentality, then it has not met the purposeful availment threshold, even if it continued pouring its products into the distribution stream. *U.S. v. Bliss*, 108 F.R.D. at 131. Logic dictates that in cases where a subsidiary/distributor sells the products of its parent/manufacturer, a plaintiff need not establish that they were operating as alter egos. The plaintiff can establish jurisdiction with evidence that suggests the parent/manufacturer intended to serve the market in the forum state and expected that its subsidiary/distributor would penetrate the market of the forum state.

5. Jurisdiction Over Industrivarden.

The Clunes contend that the Court can assert jurisdiction over Industrivarden because: (1) Linden-Alimak AB/Industrivarden designed its construction hoists for the United States market by including with those hoists signage and other documentation written in English; (2) Linden-Alimak AB/Industrivarden's distributors and/or wholly owned subsidiaries regularly sent their sales representatives into Missouri; (3) those sales representatives distributed advertising and product information produced by Linden-Alimak AB/Industrivarden; (4) Linden-Alimak AB/Industrivarden occasionally provided technicians from

Sweden to service elevators their distributors sold in the United States; and (5) Linden-Alimak AB/Industrivarden used distributors and/or wholly owned subsidiaries who sold its elevators in Missouri. *See* Plaintiffs' Sugg. in Opp. at 9.

The Clunes' contentions are not supported in factor law. The Court cannot base jurisdiction over Industrivarden in Missouri on the fact that Linden-Alimak AB/Industrivarden directed its activities toward the United States market. Designing a product for the United States market does not constitute an act by which Linden-Alimak AB/Industrivarden can be said to have purposefully availed itself of the privilege of conducting activities in Missouri. Sending Swedish technicians to the United States, without evidence that Linden-Alimak AB/Industrivarden sent any of those technicians to Missouri, does not evince an intent to serve the market in Missouri. The same can be said of Linden-Alimak AB/Industrivarden's actions in sending signage, product information, and other advertising written in English. The Clunes have failed to show, in any of these actions, an intent by Linden-Alimak AB/Industrivarden to direct its products into Missouri, to serve the Missouri market, or to otherwise purposefully avail itself of the privilege of conducting activities within Missouri.

Similarly, the Court cannot accept the Clunes' contention that it should base jurisdiction over Industrivarden on the activities of Linden-Alimak AB/Industrivarden's distributors and subsidiaries. Heede, Esco, Linden-Alimak Inc. and Alimak Inc. were not "regional" distributors with "discrete, multi-state" markets. These distributors and subsidiaries marketed over wide-ranging areas, with the smallest area

being thirteen western states (this area did not even include Missouri). Despite the Clunes' repeated assertions that Linden-Alimak AB/Industrivarden sold its elevators, distributed its materials, and serviced the Missouri market *through* its distributors and subsidiaries, the evidence shows only that Linden-Alimak AB/Industrivarden sold its elevators to its distributors and subsidiaries. The Clunes have not produced any evidence to show that Linden-Alimak AB/ Industrivarden controlled, or had any influence over, its distributors' and subsidiaries' marketing and sales decisions. Similarly, the Clunes failed to produce any evidence showing that Linden-Alimak AB/Industrivarden intended, knew, or even cared whether its distributors and subsidiaries sold its elevators in Missouri. While the Clunes successfully produced evidence to show that Heede, Esco, Linden-Alimak Inc., and Alimak Inc. knew they were selling in Missouri and intended to sell in Missouri, they failed to show that these distributors and subsidiaries were doing so under the expectations of Linden-Alimak AB/Industrivarden.

In short, there is no evidence to suggest that Linden-Alimak AB/Industrivarden exercised any control over its elevators or advertising material once the products began the journey to the United States. *See Guinness Import Company v. Mark VII Distributors, Inc.*, 153 F.3d 607, 615 n. 7 (8th Cir. 1998). Moreover, the Clunes have failed to produce any evidence that Linden-Alimak AB/Industrivarden directed or in any way influenced the distribution and sales decisions of its distributors, even after those distributors became wholly owned subsidiaries. *Id.* Finally, there is no evidence to suggest that Linden-Alimak AB/Industrivarden ever sold its elevators to its distributors and subsidiaries,

who were located halfway across the nation from Missouri (Oregon and Connecticut), with the expectation that its elevators would be sold in the Missouri market. *Cf. Vandelune*, 148 F.3d at 948 (finding that sale of 619 products, within single year, to distributor in neighboring state amounted to purposeful availment); *Barone*, 25 F.3d at 613 (discussing manufacturer's "efforts to reach much of the country through a limited number of [well-placed] regional distributors."). The Court finds that Industrivarden does not have sufficient contacts on which the Court can base jurisdiction. Having discovered the absence of even the most minimum of contacts, there is no need to consider whether exercising such jurisdiction would comport with fair play and substantial justice.

II. CONCLUSION

Based on the foregoing analysis, it is hereby ORDERED that:

1. The Clunes' motion for an extension of time is GRANTED.

2. The Clunes' and Industrivarden's motions to exceed the page limit in their suggestions in opposition and reply briefs are GRANTED. The Clerk of the Court shall file Plaintiff's Suggestions in Opposition to Defendant's Motion to Dismiss as of September 13, 1999 and Defendant's Reply as of September 16, 1999.

3. The Court DENIES the Clunes' request for leave to file a surreply brief.

Appendix C

4. Defendant Industrivarden AB's motion to dismiss for lack of personal jurisdiction is GRANTED.

5. The Clunes' motion to amend their complaint is MOOT.

IT IS SO ORDERED.

s/ Dean Whipple
Dean Whipple
United States District Court

Date OCT 27, 1999

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION DATED AND FILED NOVEMBER 13, 1998

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

No. 98-0179-CV-W-1

CAROL CLUNE,

Plaintiff,

v.

INDUSTRIVARDEN SERVICE AB, et al.,

Defendants.

ORDER

On July 7, 1998, this Court reserved ruling on Defendant Alimak Elevator Company's motion for summary judgment until such time as Plaintiff gained service on Defendant Industrivarden Service AB through the Hague Convention. Plaintiff has informed the Court that she recently affected service on Defendant Industrivarden Service AB. Plaintiff does not oppose Defendant Alimak Elevator Company's motion for summary judgment. For good cause shown, it is hereby ORDERED that summary judgment be GRANTED in favor of Alimak Elevator Company.

s/ Dean Whipple
Dean Whipple
United States District Court

Date Nov. 13, 1998

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING PETITION FOR REHEARING DATED JANUARY 22, 2001

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-1009WMKC

Carol Clune, et al.,

Appellants,

v.

Industrivarden Service AB,

Appellee.

Order Denying Petition for Rehearing
and for Rehearing En Banc

The petition for rehearing en banc is denied. Judge Beam and Judge Loken would grant the petition.

The petition for rehearing by the panel is also denied.

(5128-010199)

January 22, 2001

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
MAY 23 2001
OFFICE OF THE CLERK

No. 00-1626

IN THE

Supreme Court of the United States

INDUSTRIVARDEN SERVICE AB,

Petitioner,

v.

CAROL CLUNE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did Petitioner have minimum contacts with the State of Missouri such that the maintenance of the suit in Missouri does not offend traditional notions of fair play and substantial justice.

TABLE OF CONTENTS

Page

Question Presented for Review i

Table of Contents ii

Table of Cited Authorities iii

Statement of the Case 1

Reasons for Denying the Writ 3

1. The Eighth Circuit was Correct in Its Application of the Stream of Commerce Theory of Jurisdiction. 4

2. The Eighth Circuit Correctly Found that the Defendant is also Subject to General Jurisdiction. 10

Conclusion 13

TABLE OF CITED AUTHORITIES

Page

Cases:

Asahi Metal Industry Co., Ltd. v. Superior Court of California, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987) 3, 4

Bartow v. Extec Screens & Crushers, Ltd., 53 F. Supp. 2d 518 (D. Mass. 1999) 8

Benn v. Linden Crane Co., 370 F. Supp. 1269 (E.D. Pa. 1973) 9

Barone v. Rich Brothers Interstate Display Fireworks Company, 25 F.3d 610 (8th Cir.), *cert. denied*, 513 U.S. 948 (1994) 8

Clune v. Alimak AB, 233 F.3d 538 (8th Cir. 2000) ..... *passim*

Giotis v. Appollo of the Ozarks, 800 F.2d 660 (7th Cir. 1986), *cert. denied*, 479 U.S. 1092 (1987) 9

International Shoe Company v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945) 3

Terzano v. PFC, 986 F. Supp. 706 (D.P.R 1997) ... 7

Vandelune v. 4B Elevator Components Unlimited, 148 F.3d 943 (8th Cir.), *cert. denied*, 525 U.S. 1018 (1998) 8

Cited Authorities

Page

Vermeulen v. Renault, USA, Inc., 985 F.2d 1534 (11th Cir. 1993) 8, 9

World-Wide Volkswagen v. Woodson, 444 U.S. 286, 100 S. Ct. 580, 62 L. Ed. 2d 490 (1980) 3, 7, 8

Other Authority:

Mary Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610 (1988) 6

STATEMENT OF THE CASE

In February, 1996, Joseph Clune was working at a building site in Kansas City, Missouri when he fell to his death from a construction hoist through an unenclosed area on top of the work platform. The hoist was manufactured by Linden-Alimak AB ("Linden-Alimak"), a Swedish corporation that designed and manufactured construction hoists and other lifts. Industrivarden Service AB ("Industrivarden") is one of two successor companies of Linden-Alimak. Industrivarden is a shell corporation that has no employees and does not manufacture or sell equipment. The company now exists to handle the liabilities of Linden-Alimak. Linden-Alimak sold the accident hoist F.O.B. Swedish port to Esco Corporation ("Esco") in 1972. At the time, Esco maintained an office in Oregon and imported the hoist into the United States via Seattle, Washington.

Linden-Alimak made construction hoists, including the Clune hoist, specifically for the United States market. Linden-Alimak published sales brochures, instruction manuals and signage in English specifically for the United States market. The sales brochures show hoists in operation in the United States and stress compliance with American regulatory standards. Those construction hoists had signage with the Alimak name prominently displayed.

The only way a customer in the United States could acquire a Linden-Alimak hoist was through the company's exclusive United States distributors and later its wholly-owned subsidiary. If the customer directly contacted Linden-Alimak in Sweden, he would be referred to the American distribution system in the United States.

Beginning in 1960, Linden-Alimak had agreements with two exclusive distributors, Esco and B.M. Heede ("Heede"), to market and sell its products in the United States. In 1978, Linden-Alimak purchased Heede and it became a wholly-owned subsidiary. The name was changed from Heede to Linden-Alimak Inc. Linden-Alimak Inc.'s purpose was to sell and market Linden-Alimak products in the United States. As the exclusive sales arm of Linden-Alimak in the United States it accomplished its purpose through a network of regional sales offices. Missouri was covered by the Chicago, Illinois regional sales office.

Linden-Alimak's wholly-owned subsidiary was licensed to do business, had a registered agent, filed annual registrations and obtained certificates of authority to transact business in Missouri. Some of the members of the Board of Directors of Linden-Alimak were also board members of the wholly-owned American subsidiary. Directors and officers of Linden-Alimak filed reports in Missouri listing themselves, along with others, as the directors of the American subsidiary. Management of the American subsidiary went to Sweden to report to Linden-Alimak concerning needed product improvement and anticipated sales in the United States.

Linden-Alimak's exclusive distributors and later wholly-owned subsidiary sent salesmen into Missouri on a regular basis for the purpose of selling Linden-Alimak's products and providing advice. Between 1960 and 1986, over 700 of the company's construction hoists were sold in the United States. Twenty to forty of those construction hoists were sold in Missouri during that time period. Linden-Alimak had actual knowledge that its products were being marketed and sold in Missouri.

Industrivarden, as successor corporation to Linden-Alimak, purchased product liability insurance to cover its liabilities for construction hoists sold in the United States. Industrivarden also engages in a continuing duty to warn concerning the safety of hoists located in the United States and acknowledges an obligation to make, if necessary, safety retrofits on these hoists.

Based on the above facts, the Eighth Circuit Court of Appeals found Linden-Alimak had purposely directed its products to the United States and Missouri through the distribution system it established in this country. Therefore, there were sufficient minimum contacts with Missouri to satisfy the due process standards set by the Supreme Court.

REASONS FOR DENYING THE WRIT

Constitutional "due process requires only that in order to subject a defendant to a judgment in the forum . . . he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Company v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945). This Court, cutting to the heart of the matter, has held that due process is satisfied if the "defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297-98, 100 S. Ct. 580, 62 L. Ed. 2d 490 (1980). This Court has further held that "marketing the product through a distributor who has agreed to serve as the sales agent in the forum state" is the type of conduct that indicates an intent or purpose to serve the market in the forum state. *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102, 112, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987).

1. The Eighth Circuit was Correct in Its Application of the Stream of Commerce Theory of Jurisdiction.

In *Asahi*, the United States Supreme Court stated that although the placement of a product into the stream of commerce, without more, is not an act of a defendant purposefully directed toward the forum state, "additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum state . . . ." *Asahi*, 480 U.S. at 112. Justice O'Connor gave some examples of the type of conduct by a defendant that may indicate an intent or purpose to serve the market in the forum state: ". . . designing the product for the market in the forum state, advertising in the forum state, establishing channels for providing regular advice to customers in the forum state, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum state." *Id.*

The Eighth Circuit in this case found it extremely significant that Linden-Alimak created the distribution system that brought the construction hoists to the United States and Missouri. "[W]ithout the existence of its subsidiaries, Industrivarden would not be able to distribute its product in the United States. This connection between the foreign manufacturer and the resident subsidiary represents more than simply placing a product into the stream of commerce." *Clune v. Alimak AB*, 233 F.3d 538, 547 (8th Cir. 2000) (App. A at 19a).

As the majority opinion found, the facts of this case demonstrated Linden-Alimak's purposeful availment of the privilege of doing business in Missouri and the hoist's location in Missouri was not mere happenstance.

> Linden-Alimak AB/Alimak AB designed its construction hoist for the United States market. The company had exclusive distribution agreements with United States distributors. The Swedish parent's logo was displayed on products that were sold in the United States. Linden-Alimak AB/Alimak AB also conducted training seminars in the United States for technicians employed by Alimak, Inc. who serviced hoists that were sold by this subsidiary. Of the 700 construction hoists that were sold in the United States by the company's distributors, between 20 and 40 ended up in Missouri. This fact alone makes it difficult for us to characterize the hoist's location in Missouri as random, attenuated or fortuitous. *See Burger King*, 471 U.S. at 475. Additionally, the Swedish parent provided sales brochures and instruction manuals to its distributors for use in promoting and servicing its products in the United States. Members of the Swedish parent's board of directors also served as directors of its subsidiary. Any of these facts taken alone, might fall short of purposeful availment, however, when taken together they show that Linden-Alimak AB/Alimak AB engaged in a series of activities that were designed to generate profits to the parent from its subsidiaries' sales across the United States.

Clune, 233 F.3d at 543-44 (App. A at 10a and 11a).

. . .

> The facts show that Linden-Alimak AB/Alimak AB purposefully directed its products to the United States through the distribution system it set up in this country. The company knew that by virtue of this system, its construction hoist entered the Missouri and other Midwest markets. Linden-Alimak AB/Alimak AB's creation of this system that brought hoists to Missouri established sufficient minimum contacts with the forum to satisfy the due process standards set by the Supreme Court and followed by this circuit.

Id. at 544 (App. A. at 13a).

Petitioner complains that the Eighth Circuit was incorrect in relying on the stream of commerce theory because stream of commerce is a type of specific jurisdiction. Petitioner argues that because the actual elevator involved in this accident was not originally sold by the Petitioner in Missouri, under the "substantive relevance" test the litigation does not "arise out of or relate to" the activities of the Petitioner in Missouri, and therefore cannot qualify as specific jurisdiction. *See* Petition for Writ of Certiorari at 18.[1]

1. Much of Petitioner's brief contains general statements from Law Review articles concerning various tests to be used to determine specific versus general jurisdiction and how to interpret the phrase "arising out of or related to". Interestingly, these authorities would appear to have little difficulty in finding that jurisdiction is appropriate in this case. *See, e.g.*, Mary Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610, 662 (1988) ("[I]t is the fact that this accident occurred within the forum coupled with the similarity between the manufacturer's conduct in the forum and the conduct underlying the plaintiff's cause of action, that makes exercising jurisdiction over this claim particularly reasonable. . . . The fact that the car was not actually sold within the state is, in this context, fortuitous").

Contrary to Petitioner's argument, the Eighth Circuit made it clear that the facts of this case demonstrate that the hoist's location in Missouri was not simply random, attenuated or fortuitous. *Clune*, 233 F.3d at 544 (App. A. at 13a). Linden-Alimak "did more than simply set a product adrift in the international stream of commerce. The record shows Linden-Alimak AB/Alimak AB created the distribution system that brought the hoist to Missouri." *Id.* at 543 (App. A. at 8a).

Petitioner argues that "[c]ourts have consistently held that general personal jurisdiction analysis applies where the injurious product was sold outside the forum and brought into the forum by third persons not controlled by the defendants." *See* Petition for Writ of Certiorari at 18. Petitioner cites only one case for this proposition, *Terzano v. PFC*, 986 F. Supp. 706 (D.P.R 1997).[2] *Terzano* is easily distinguishable from the facts in this case. In *Terzano* the defendant manufacturer's luggage was made in New York, purchased in New Jersey, and caused an accident in Florida. The lawsuit was brought in Puerto Rico, where the plaintiff lived but where there was no evidence that the manufacturer sold this type of luggage. Contrast the facts in *Terzano* to this case where the accident occurred in the forum state and where Linden-Alimak already had a substantial and ongoing presence selling this exact type of construction hoist in Missouri through a distribution network it had established.

The fact that the sale of a product occurred initially outside the forum state has not been a serious detriment for courts to find personal jurisdiction over a foreign manufacturer. In *World-Wide Volkswagen*,

2. The First Circuit had already rejected the stream of commerce theory as a means to establish personal jurisdiction. *Terzano*, 986 F. Supp. at 712.

444 U.S. at 297-99, the Supreme Court noted in dicta that there was undisputed personal jurisdiction over a foreign manufacturer in the state of injury despite the fact that the product was purchased in another state.

In *Barone v. Rich Brothers Interstate Display Fireworks Company*, 25 F.3d 610 (8th Cir.), *cert. denied*, 513 U.S. 948 (1994), the manufacturer sold its fireworks to a distributor located in South Dakota. The injury to the plaintiff ultimately occurred in Nebraska. The Eighth Circuit upheld the assertion of personal jurisdiction over the manufacturer in Nebraska.

In *Vandelune v. 4B Elevator Components Unlimited*, 148 F.3d 943 (8th Cir.), *cert. denied*, 525 U.S. 1018 (1998), the manufacturer sold the product to a company in England. The product was then sold three more times before it caused an injury to the plaintiff in Iowa. The Eighth Circuit found the foreign manufacturer subject to jurisdiction in Iowa.

Other courts agree with the Supreme Court and the Eighth Circuit that specific jurisdiction applies despite the fact the product was initially sold outside the forum state.

> The Court finds misplaced Extec's argument that the court lacks specific jurisdiction because Bartow's employer purchased the machine in Pennsylvania and had it shipped to Connecticut. So long as the defendant has sufficient minimum contacts with the forum jurisdiction, it is irrelevant that the individual product causing the injury was purchased in another state.

Bartow v. Extec Screens & Crushers, Ltd., 53 F. Supp. 2d 518, 527, note 2 (D. Mass. 1999). *See also Vermeulen v. Renault, USA, Inc.*, 985 F.2d 1534, 1537, 1550 (11th Cir.

1993) (personal jurisdiction properly asserted over foreign manufacturer in state of accident despite purchase of car by plaintiff from brother outside the accident state); *Giotis v. Appollo of the Ozarks*, 800 F.2d 660, 668 (7th Cir. 1986) (personal jurisdiction exists where product sold outside forum and brought to forum by third party), *cert. denied*, 479 U.S. 1092 (1987); *Benn v. Linden Crane Co.*, 370 F. Supp. 1269, 1277 (E.D. Pa. 1973) (It is "constitutionally irrelevant whether the particular crane in issue was one of the 19 cranes sold within the state in assessing the propriety of *in personam* jurisdiction").

In this case, plaintiffs' cause of action accrued when Joseph Clune fell to his death in Missouri from a construction hoist designed and manufactured by the defendant. Having contracted with its distributor to sell hoists in Missouri, having sent brochures into Missouri, having solicited sales in Missouri, having sold 20 to 40 hoists in Missouri, having acknowledged a continuing duty to warn and to safety retrofit hoists in Missouri, having manufactured a defective hoist that caused the death of Joseph Clune in Missouri, and having committed a tort in Missouri, there is no question that a direct relationship exists between the Clunes' wrongful death action and the defendant's contacts with Missouri.[3]

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3. We are not persuaded by Industrivarden's argument that it was unaware of what happened to its products after they left the Swedish port. . . . If we were to conclude that despite its distribution system, Linden-Alimak AB/Alimak AB did not intend its products to flow into Missouri, we would be bound to the conclusion that the company did not intend its products to flow into *any* of the United States.

Clune, 233 F.3d at 545 (App. A at 12a) (emphasis in original).

2. The Eighth Circuit Correctly Found that Defendant is also Subject to General Jurisdiction.

Petitioner argues that the Eighth Circuit majority did not find contacts arising to the level of "continuous and systematic" with Missouri. *See* Petition for Writ of Certiorari at 19. This is simply not true. The majority opinion found that the record demonstrated "evidence of continuous transactions between Linden-Alimak AB and its United States distributors." *Clune*, 233 F.3d at 545, note 9 (App. A at 13a-14a). In addition, the court found:

> Linden-Alimak AB/Alimak AB's activities cannot be characterized as amounting to "nothing more than place its products in the stream of commerce." *Falkirk*, 906 F.2d at 376. Contrary to the defendant in *Falkirk*, who was totally without information about the ultimate destination of its product, Linden-Alimak AB/Alimak AB, at minimum, had constructive knowledge that its construction hoists would end up in Missouri. The parent knew that by 1986, 20 to 40 hoists were sold into the state. Also, the intermingling of directors and officers between Linden-Alimak AB/Alimak AB and Alimak, Inc. suggests that the parent was aware of its subsidiary's activities. *See, e.g., Iota Management Corp. v. Boulevard Investment Co.*, 731 S.W.2d 399, 410 (Mo. Ct. App. 1987) (corporation is charged with knowledge of its officers and agents).

Clune, 233 F.3d at 545, note 9 (App. A at 14a).

The concurring opinion also found sufficient facts to support general jurisdiction.

> The District Court ignored evidence that suggests that Industrivarden exercised control over its subsidiaries' marketing and sales decisions. Industrivarden produced sales brochures which were distributed to residents and consumers in Missouri by its distributors and subsidiaries. At least three members of the subsidiary's board of directors were also directors of the foreign manufacturer. Pursuant to Missouri law, Mo. Rev. Stat. § 351.310 (1986), these directors of the subsidiary "controlled and managed" the business of the subsidiary. These directors made no effort to exclude Missouri from its United States sales. At least two of the directors of the subsidiary were also officers of the foreign manufacturer. Courts have found that to be an important factor in determining whether there are sufficient minimum contacts. *See Hawes v. Honda Motor Co., Ltd.*, 738 F. Supp. 1247, 1251 (E.D. Ark. 1990). Under Missouri law, a corporation is charged with the knowledge of its officers and agents. *Iota Mgmt. Corp. v. Boulevard Inv. Co.*, 731 S.W.2d 399, 410 (Mo. App. 1987). Consequently, the foreign manufacturer had knowledge, through its officers and directors, of all of its subsidiary's contacts, sales, and marketing.

Id. at 547 (App. A at 18a).

The defendant sold its hoists in the United States and Missouri through its distributors from 1960 to 1978 and then through its subsidiary from 1978 to 1988. The defendant

produced sales brochures that were distributed to consumers in Missouri by its distributors and subsidiaries. The subsidiaries held certificates of authority to conduct business in Missouri, employed sales representatives to sell Linden-Alimak's product in Missouri, and the parent company and its subsidiary shared some common directors and officers. These acts clearly satisfy the continuous and systematic requirement.

Petitioner argues that even if defendant's contacts with Missouri were "continuous and systematic," general jurisdiction is not proper since the contacts did not occur during the appropriate time frame. Petitioner argues that the relevant time period to determine jurisdictional contacts must be reasonably close in time to the filing of the lawsuit. Although acknowledging 7 years would be reasonable petitioner argues 10 years is too long. *See* Petition for Writ of Certiorari at 21.

In 1988, Linden-Alimak became a shell corporation. At that point, it no longer manufactured hoists, but several hundred of its construction hoists hd already been delivered to the United States and subsequently distributed, directly and indirectly, throughout the entire country. To say it can no longer be held responsible in those states where it marketed its defective hoists 9 years earlier (as opposed to 7) makes no sense. In addition, Industrivarden still has contacts with the State of Missouri, and still owes a duty to the people in Missouri who use its defective hoists. By contract, Industrivarden assumed Linden-Alimak's liability for the defective hoists and maintains insurance to cover these liabilities. Industrivarden recognizes, and has in

fact engaged in, a continuing duty to warn concerning the safety of these hoists and acknowledges an obligation to make safety retrofits if necessary.[4]

CONCLUSION

The Eighth Circuit was correct in finding that Petitioner had minimum contacts with the State of Missouri such that maintenance of the suit in Missouri does not offend traditional notions of fair play and substantial justice. Respondents therefore respectfully request the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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4. The majority opinion held that Linden-Alimak AB "was present" in Missouri from the time the crane entered Missouri until the time the product ceased to exist in the state. Because the crane must have been present at the time Joseph Clune fell from it the timing of the contacts was proper for personal jurisdiction purposes." *Clune*, 233 F.3d at 544, note 8 (App. A at 10).

(3)

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IN THE

Supreme Court of the United States

INDUSTRIVARDEN SERVICE AB,

Petitioner,

v.

CAROL CLUNE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Statement of the Case	1
Reasons for Granting the Writ	1
I. The Eighth Circuit Misapplied Specific Jurisdiction Principles In Finding Jurisdiction Over Petitioner In Missouri Because Respondents' Cause Of Action Did Not "Arise Out Of Or Relate To" Petitioner's Contacts With Missouri.	2
II. The Eighth Circuit Did Not Find Petitioner Subject To The General Jurisdiction Of Missouri Courts In That Petitioner's Contacts With Missouri Were Not "Continuous And Systematic" During The Relevant Time Frame.	6
Conclusion	9

TABLE OF CITED AUTHORITIES

Page

Cases:

Barone v. Rich Brothers Interstate Display Fireworks Company, 25 F.3d 610 (8th Cir.), *cert. denied*, 513 U.S. 948 (1994) 4, 5

Bartow v. Extec Screens & Crushers, Ltd., 53 F. Supp. 2d 518 (D. Mass. 1999) 5

Benn v. Linden Crane Co., 370 F. Supp. 1269 (E.D. Pa. 1973) 5

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) 1, 3

Cannon Manufacturing Company v. Cudahy Packing Company, 267 U.S. 333, 45 S. Ct. 250, 69 L. Ed. 634 (1925) 8

Clune v. Alimak AB, 233 F.3d 538 (8th Cir. 2000) 3, 4, 7

Giotis v. Appollo of the Ozarks, 800 F.2d 660 (7th Cir.), *cert. denied*, 479 U.S. 1092 (1987) 5

Kuenzle v. HTM Sport-Und Friezeitgerate AG, 102 F.3d 453 (10th Cir. 1996) 6

Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560 (2d Cir.), *cert. denied*, 519 U.S. 1006, 117 S. Ct. 508, 136 L. Ed. 2d 398 (1996) 8

Cited Authorities

	Page
Rush v. Savchuk, 444 U.S. 320, 100 S. Ct. 571, 62 L. Ed. 2d 516 (1980)	4
Vandelune v. 4B Elevator Components Unlimited, 148 F.3d 943 (8th Cir.), *cert. denied*, 525 U.S. 1018 (1998)	4, 5
Vermeulen v. Renault, USA, Inc., 985 F.2d 1534 (11th Cir. 1993)	5

STATEMENT OF THE CASE

In 1972, Petitioner manufactured and sold the subject construction hoist F.O.B. Swedish port to an independent U.S. distributor, Esco Corporation ("Esco"), whose area of distribution included thirteen western states but did not include Missouri. Esco imported the subject hoist to the United States via Seattle, Washington. The subject hoist ultimately ended up in Missouri in 1996 through unknown channels and as a result of the unilateral activity of third persons beyond Petitioner's control. Respondents allege that defects in the subject hoist caused decedent's death when he fell from it in Missouri in 1996.

At the time of the sale of the subject hoist in 1972, Petitioner also sold construction hoists to one other independent U.S. distributor, B.M. Heede ("Heede"). Heede's area of distribution did include Missouri. The subject hoist was not sold to Heede, and there is no evidence that Heede had any contact with the subject hoist.

REASONS FOR GRANTING THE WRIT

A state may assert specific personal jurisdiction over a nonresident defendant only if "the defendant has 'purposefully directed' his activities at residents of the forum, **and** the litigation results from alleged injuries that **'arise out of or relate to'** those activities." *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-73, 105 S. Ct. 2174, 2182, 85 L. Ed. 2d 528 (1985) (citations omitted) (emphasis added). In other words, two elements must be satisfied before a court may find the "minimum contacts" necessary to confer specific personal jurisdiction over a defendant.

With respect to the second element of the test, some circuits use the "substantive relevance" test to determine whether a plaintiff's cause of action "arises out of or relates to" a defendant's contacts with the forum. Other circuits use the "but for" test in making this determination. Still other circuits, like the Eighth Circuit, have adopted neither of these tests and instead only address the "purposeful availment" element.

In recent years, this Court has grappled with the "purposeful availment" element of this test through its treatment of the "stream of commerce" theory of personal jurisdiction. The case at bar presents this Court with the rare opportunity to clearly define for all circuits when a cause of action can be said to "arise out of or relate to" a defendant's contacts with a forum. A great deal of constitutional weight rides on the interpretation and application of this phrase; indeed, the phrase defines the relationship between the forum state and the defendant necessary to exercise specific personal jurisdiction.

I.

THE EIGHTH CIRCUIT MISAPPLIED SPECIFIC JURISDICTION PRINCIPLES IN FINDING JURISDICTION OVER PETITIONER IN MISSOURI BECAUSE RESPONDENTS' CAUSE OF ACTION DID NOT "ARISE OUT OF OR RELATE TO" PETITIONER'S CONTACTS WITH MISSOURI.

Where a court seeks to assert specific jurisdiction over a nonresident defendant, the "minimum contacts" prong of the constitutional analysis is satisfied only if "the defendant has 'purposefully directed' his activities at residents of the

forum, **and** the litigation results from alleged injuries that **'arise out of or relate to'** those activities." *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-73, 105 S. Ct. 2174, 2182, 85 L. Ed. 2d 528 (1985) (citations omitted) (emphasis added). In the instant case, the Eighth Circuit majority found that Petitioner purposely availed itself of the privilege of conducting business in Missouri by using one or two United States distributors to distribute its products. *See Clune v. Alimak AB*, 233 F.3d 538, 544 (8th Cir. 2000). (Pet. App. A at 12a).

However, the Eighth Circuit completely neglected the second prong of the test necessary for a finding of specific personal jurisdiction, *to wit*: Did Respondents' cause of action for wrongful death "arise out of or relate to" Petitioner's contacts with the State of Missouri? If the answer to this question is "no," then a Missouri court does not have specific personal jurisdiction over Petitioner. In addition, because Missouri courts do not have general personal jurisdiction over Petitioner (*see* Part II., *infra*), the case should be dismissed for lack of personal jurisdiction.

Respondents do not dispute the following chain of events: The allegedly defective construction hoist was manufactured in Sweden and sold F.O.B. Swedish port in 1972 to an independent U.S. distributor whose territory did not include Missouri. The subject hoist was imported into the United States by that distributor via Seattle, Washington, and the hoist, through unknown channels unrelated to Petitioner, made its way to Missouri, where decedent fell from it and died.

Under these facts and the "substantive relevance" test, Respondents' cause of action did not arise out of or relate to

Petitioner's contacts with Missouri. Any contacts that Petitioner may have had with Missouri were made through Heede, the distributor (and later subsidiary) whose distribution area encompassed the state of Missouri. Heede did not import the subject construction hoist. Esco, the other U.S. distributor used by Petitioner, imported the subject hoist. Esco's area of distribution did not include Missouri. Therefore, the contacts of Petitioner with Missouri, if any, were not substantively relevant to Respondents' cause of action, nor were they related to "the operative facts of the litigation." *See Rush v. Savchuk*, 444 U.S. 320, 329, 100 S. Ct. 571, 578, 62 L. Ed. 2d 516 (1980).

In their Opposition, Respondents, like the Eighth Circuit, point to the distribution system established by Petitioner to support specific personal jurisdiction over it in Missouri. (Opp. at 7). The Eighth Circuit found that by using a United States distributor whose territory included Missouri, Petitioner satisfied the "purposeful availment" element of the test. *Clune v. Alimak AB*, 233 F.3d at 544. (Pet. App. A at 11a-12a). This, however, does not end the inquiry. A court must also find that Respondents' cause of action "arises out of or relates to" Petitioner's contacts with the state of Missouri.

Respondents do not specifically address this question. Indeed, a careful reading of the cases cited by Respondents in support of their position is quite revealing. (Opp. at 8-9). While each case cited addresses the "purposeful availment" requirement of the "minimum contacts" analysis, not one of the cases addresses or even recognizes the "arising out of or related to" requirement. *See Barone v. Rich Brothers Interstate Display Fireworks Company*, 25 F.3d 610 (8th Cir.), *cert. denied*, 513 U.S. 948 (1994); *Vandelune v.*

4B Elevator Components Unlimited, 148 F.3d 943 (8th Cir.), *cert. denied*, 525 U.S. 1018 (1998); *Bartow v. Extec Screens & Crushers, Ltd.*, 53 F. Supp. 2d 518 (D. Mass. 1999); *Vermeulen v. Renault, USA, Inc.*, 985 F.2d 1534 (11th Cir. 1993); *Giotis v. Appollo of the Ozarks*, 800 F.2d 660 (7th Cir.), *cert. denied*, 479 U.S. 1092 (1987); *Benn v. Linden Crane Co.*, 370 F. Supp. 1269 (E.D. Pa. 1973).

Respondents do not dispute the current split in the circuits in defining the scope of the phrase "arising out of or related to" for purposes of specific personal jurisdiction. Some circuits have adopted the "substantive relevance" test. (Pet. at 16). Others have adopted the "but for" test. (Pet. at 15).

Not surprisingly, the Eighth Circuit has adopted neither of these tests because it does not incorporate this element into its "minimum contacts" analysis. *See Barone v. Rich Brothers Interstate Display Fireworks Company*, 25 F.3d 610 (8th Cir.), *cert. denied*, 513 U.S. 948 (1994); *Vandelune v. 4B Elevator Components Unlimited*, 148 F.3d 943 (8th Cir.), *cert. denied*, 525 U.S. 1018 (1998). In reversing a district court decision, a recent Tenth Circuit opinion emphasized the importance of addressing both elements of the test:

> In finding that [defendant] had sufficient contacts with Wyoming to justify the assertion of personal jurisdiction, the district court considered only one branch of the specific jurisdiction test: the degree of purposeful availment reflected in the contacts of the defendant with the forum state. Although the district court gave extensive review to that issue,

> it did not address the second prong, which must be met before a court can properly exercise specific jurisdiction. The contacts must reflect purposeful availment *and* the cause of action must arise out of those contacts.

Kuenzle v. HTM Sport-Und Friezeitgerate AG, 102 F.3d 453, 456 (10th Cir. 1996) (emphasis in original).

The question concerning the proper interpretation and application of the phrase "arising out of or related to" in specific personal jurisdiction jurisprudence is dispositive of the jurisdictional issue presented here and is squarely before this Court for its determination.

II.

THE EIGHTH CIRCUIT DID NOT FIND PETITIONER SUBJECT TO THE GENERAL JURISDICTION OF MISSOURI COURTS IN THAT PETITIONER'S CONTACTS WITH MISSOURI WERE NOT "CONTINUOUS AND SYSTEMATIC" DURING THE RELEVANT TIME FRAME.

In their Opposition and contrary to a reasonable reading of the Eighth Circuit's decision, Respondents claim that the Eighth Circuit majority found Petitioner subject to the general personal jurisdiction of Missouri courts. (Opp. at 10). Of course, such a finding would obviate the need for this Court to reach the salient issue of whether Respondents' cause of action "arose out of or related to" Petitioner's Missouri contacts necessary for the exercise of specific personal jurisdiction.

In an attempt to support their assertion, Respondents cite a portion of a footnote in the majority opinion, which states that the record "contains evidence of continuous transactions between [Petitioner] and its United States distributors." *See Clune v. Alimak AB*, 233 F.3d at 545 n.9 (8th Cir. 2000). (Pet. App. A at 13a-14a). (Opp. at 10). This excerpt from the Eighth Circuit's opinion refers to contact between Petitioner and its distributors, **not** between Petitioner and Missouri.

Respondents also go on to cite another portion of the same footnote in support of its untenable position: "[Petitioner], at minimum, had constructive knowledge that its construction hoists would end up in Missouri. [Petitioner] knew that by 1986, 20 to 40 hoists were sold into the state. . . ." *Id.* (Pet. App. A at 14a). (Opp. at 10). The fact that twenty to forty of its construction hoists ended up in the State of Missouri between 1947 and 1986 does not constitute the "continuous and systematic" contacts necessary to confer general personal jurisdiction over Petitioner in Missouri courts. In fact, the Eighth Circuit recognized that twenty to forty hoists ending up in Missouri, when taken alone, may even fall short of "purposeful availment." *Id.* at 543-44. (Pet. App. A at 10a-11a).

Respondents also point to the activity of Petitioner's distributors (1960-1978) and subsidiary (1978-1988) in an attempt to show that Petitioner's contacts with Missouri were "continuous and systematic." (Opp. at 11-12). Indeed, Judge Bright's concurrence, which seems to base jurisdiction over Petitioner on general personal jurisdiction principles absent a finding of "continuous and systematic" contacts with Missouri and without any reference to the timing of the alleged contact, is based on the contacts of Petitioner's subsidiary with the state of Missouri. *Id.* at 546-47 (Bright, J., concurring). (Pet. App. A at 17a-19a).

While Petitioner does not believe the contacts of its independent distributors and/or wholly owned subsidiaries with the state of Missouri can be used to establish jurisdiction over it, *Cannon Manufacturing Company v. Cudahy Packing Company*, 267 U.S. 333, 45 S. Ct. 250, 69 L. Ed. 634 (1925), even if such contacts are used, they are so antiquated as to be irrelevant. In general personal jurisdiction cases, courts will "examine a defendant's contacts with the forum state over a period that is reasonable under the circumstances — **up to and including the date the suit was filed** — to examine whether they satisfy the 'continuous and systematic' standard." *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 569-70 (2d Cir.), *cert. denied*, 519 U.S. 1006, 117 S. Ct. 508, 136 L. Ed. 2d 398 (1996) (emphasis added).

Petitioner discontinued its manufacturing business in 1988. Respondents filed suit in December 1997. At least ten years passed without any Missouri contacts, let alone "continuous and systematic" contacts. No court has found that a ten-year or greater period of time prior to filing suit is an appropriate and reasonable time frame in which to measure a defendant's forum contacts for general personal jurisdiction purposes. (Pet. at 21). Moreover, even if this Court found a ten-year time period to be reasonable under the circumstances to assess Petitioner's contacts with Missouri, there is no evidence in the record to support a finding that Petitioner had "continuous and systematic" contacts with Missouri from 1988 to 1997.

Plaintiffs' cause of action did not "arise out of or relate to" Petitioner's contacts with Missouri. Petitioner's contacts with Missouri were not "continuous and systematic" at any time, much less during a reasonable period of time preceding

plaintiffs' filing of suit. Therefore, Missouri courts cannot exercise specific or general personal jurisdiction over Petitioner. As a result, Petitioner's contacts with the state of Missouri were insufficient to satisfy the requirements of the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For the reasons set forth above and in its accompanying petition, Petitioner requests that this Court grant its petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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